No. 2790

No. 13765

United States
Court of Appeals
for the Ninth Circuit

G. L. THOMPSON, as Trustee in Bankruptcy of the Union Lead Mining and Smelter Company, bankrupt, Appellant,

vs.

R. H. DACHNER, Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

ALEX L. ARGUELLO, Esq.,

369 Pine Street, Penthouse,
San Francisco 4, California,

Attorney for Appellant.

HELLER, EHRMAN, WHITE & McAULIFFE,

14 Montgomery Street,
San Francisco, California,

Attorneys for Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 39,899

In the Matter of UNION LEAD MINING AND SMELTER COMPANY, Bankrupt,

G. L. THOMPSON, as Trustee in Bankruptcy of Union Lead Mining and Smelter Company, Bankrupt, Petitioner,

vs.

R. H. DACHNER, Respondent.

PETITION FOR ANCILLARY ADMINISTRATION

The Petition of G. L. Thompson, as Trustee in Bankruptcy for the above-named bankrupt respectfully represents:

I.

That the above-named Union Lead Mining and Smelter Company was duly adjudicated a bankrupt on February 9, 1948, on a petition filed in the District Court of the United States for the District of Nevada on February 7, 1948.

II.

That on February 9, 1948, the District Judge for the United States District Court for the District of Nevada made an order of reference referring the above-entitled matter to the Referee in Bankruptcy for said Court.

III.

That Frank W. Ingram is the duly appointed, acting and qualified Referee in Bankruptcy for the United States District Court for the District of Nevada.

IV.

That your petitioner is the Trustee of the estate of said bankrupt by an appointment dated February 6, 1951 and by an order approving said Trustee's bond dated February 7, 1951, said appointment and said order issuing out of the District Court of the United States for the District of Nevada.

V.

That by a petition filed on the 10th day of May, 1951 your petitioner, in a petition directed to the Referee in Bankruptcy of the District Court of the United States for the District of Nevada petitioned said Referee for an order granting your petitioner authority to commence all proper and convenient ancillary proceedings against said R. H. Dachner.

VI.

That by an order dated the 10th day of May, 1951 Frank W. Ingram, Referee in Bankruptcy of the District Court of the United States for the District of Nevada ordered that your petitioner be given, and then was given authority and power to commence, maintain and prosecute ancillary proceedings against the said R. H. Dachner for the sum of $26,266.81 together with interest on said sum in the United States District Court for the Northern

District of California, Southern Division, or in any other United States District Court in whose District the said R. H. Dachner may be found and served or in whose District said $26,266.81 or any part of said sum may be found, said order being attached hereto and made a part hereof.

VII.

That at the time of filing said petition in bankruptcy one R. H. Dachner had in his possession or under his control $26,266.81 belonging to the bankrupt estate, which said R. H. Dachner received from the bankrupt on the 20th day of November, 1947.

VIII.

That at the time of filing said petition said R. H. Dachner had no claim adverse to your petitioner to said $26,266.81 and at most had only a colorable claim to said sum.

IX.

That said R. H. Dachner now has in his possession or under his control $26,266.81.

X.

That your petitioner has made demand upon R. H. Dachner for the surrender and possession of said $26,266.81 and that said R. H. Dachner has failed and refused to comply with such demand.

XI.

That on the 20th day of November, 1947, R. H. Dachner obtained a lien upon $26,266.81 belonging to the bankrupt estate.

XII.

That on the 20th day of November, 1947 the Union Lead Mining and Smelter Company, Bankrupt was insolvent.

XIII.

That R. H. Dachner now has in his possession or under his control $26,266.81 obtained by him by reason of the lien set out in Paragraph XI of this Petition, which lien was secured by the enforcement of an execution given on a judgment issuing out of the Second Judicial District Court of the State of Nevada in and for the County of Washoe, which judgment was reversed by the Supreme Court of the State of Nevada by a judgment entered in said Court on the 25th day of June, 1948.

XIV.

That said R. H. Dachner obtained said $26,266.81 in fraud of the provisions of the Bankruptcy Act.

Wherefore, your petitioner prays:

1. That the said R. H. Dachner be directed forthwith to surrender possession of said $26,266.81 together with interest thereon, and that your petitioner have such other and further relief as is just.

2. That this Court enter an order referring the matter to the Referee in Bankruptcy for this Court and further order said Referee to assume summary jurisdiction of said matter and to conduct summary hearings in said matter in regard to said $26,266.81.

3. For an order directing the Clerk to issue a Subpoena commanding said R. H. Dachner to ap-

pear before the Referee in Bankruptcy for this Court at a time and place to be set by said Referee and requiring said R. H. Dachner to show cause why he should not turn over to the Trustee said $26,266.81.

4. For an order directing the Clerk of this Court to issue all necessary Subpoenae and Summons which may be required in the necessary and convenient maintenance and prosecution of the above-entitled matter as regards said $26,266.81.

Dated: This 5th day of June, 1951.

STEWART and HORTON,

Attorneys for G. L. Thompson, Trustee in Bankruptcy for Union Lead Mining and Smelter Company, Bankrupt,

/s/ By ROYAL A. STEWART,
Of Counsel for Petitioner G. L. Thompson and

ALEX L. ARGUELLO,
Special Counsel for G. L. Thompson, Trustee,

/s/ ALEX L. ARGUELLO

Duly Verified.

[Endorsed]: Filed June 18, 1951.

In the District Court of the United States
For the District of Nevada

In Bankruptcy—No. 743 A-58-A

In the Matter of UNION LEAD MINING AND SMELTER COMPANY, A Nevada Corporation, Bankrupt.

ORDER

Upon the Petition of the Trustee in the Above-Entitled Matter, and it Further Appearing as Follows:

1. That the above-named Union Lead Mining and Smelter Company was duly adjudicated a bankrupt on February 9th, 1948, on a voluntary petition filed in this Court by said Company on February 7th, 1948;

2. That the petitioner is the Trustee of the estate of said bankrupt by an appointment dated February 6th, 1951, and an order approving said Trustee's bond dated February 7th, 1951, issued out of this Court;

3. That at the time of the filing of said petition in bankruptcy one R. H. Dachner had in his possession or under his control $26,266.81 belonging to said estate;

4. That on the 20th day of November, 1947, said R. H. Dachner received $26,266.81 belonging to said estate under an execution given upon a judgment issuing out of the Second Judicial District Court of the State of Nevada in and for the County of

Washoe; that at the time of said execution of said judgment said bankrupt was insolvent, and that said execution was in fraud of the provisions of the Bankruptcy Act, and which judgment was reversed by the Supreme Court of the State of Nevada during this bankruptcy;

5. That the said R. H. Dachner now has in his possession or under his control $26,266.81;

6. That the petitioner as Trustee in Bankruptcy is entitled to the immediate possession of said $26,266.81;

7. That the petitioner petitioned this Court for a turn-over order against the said R. H. Dachner for said $26,266.81, but that the said turnover order and said petition was refused on the basis that the said R. H. Dachner was not served within the territorial limits of this Court;

8. That the said R. H. Dachner is not a resident of the State of Nevada and is not subject to the service of process within the territorial limits of this Court; and,

9. It appearing necessary for the production of the creditors of said estate and for the collection of the assets of said estate;

It Is Hereby Ordered that the Trustee be given, and he hereby is given, authority and power to commence, maintain and prosecute ancillary proceedings against the said R. H. Dachner for the sum of $26,266.81, together with interest on said sum, in the United States District Court for the Northern District of California, Southern Division, or in any other United States District Court in whose

District the said R. H. Dachner may be found and served, or in whose District said $26,266.81 or any part of said sum may be found.

Dated at Reno, Nevada, this 10th day of May, 1951.

/s/ FRANK W. INGRAM,
Referee in Bankruptcy.

I certify that the foregoing is a true and correct copy of the original on file and of record in the office of Referee in Bankruptcy for the District of Nevada.

/s/ FRANK W. INGRAM,
Referee in Bankruptcy

[Endorsed]: Filed May 10, 1951.

[Title of District Court and Cause No. 39,899.]

ORDER

The verified Petition of G. L. Thompson, as Trustee in Bankruptcy for the above-named bankrupt having been filed in the above-entitled Court and sufficient cause appearing, the above-entitled Court hereby assumes ancillary jurisdiction of the above-entitled matter for the purpose of hearing and determining the matters set forth in said petition and hereby orders:

1. That R. H. Dachner show cause before the Honorable Burton J. Wyman, Referee in Bank-

ruptcy at a time and place to be set by said Referee why he should not forthwith surrender possession of said $26,266.81 together with interest thereon and why this Court should not grant said petitioner such other and further relief as is just, and it is further,

2. Ordered that the above-entitled matter be, and hereby is referred to the Honorable Burton J. Wyman, Referee in Bankruptcy for the purpose of summarily hearing and determining the matters set forth in said petition; and it is further ordered

3. That the Clerk of the above-entitled Court be, and hereby is ordered to issue any necessary process at the request of said Referee commanding said R. H. Dachner to appear before said Referee at a time and place to be set by said Referee and requiring said R. H. Dachner to show cause why he should not turn over to the Trustee the sum set out in said petition; and further ordering

4. That the Clerk of the above-entitled Court issue all other subpoenae and summons which may be required in the necessary and convenient maintenance, prosecution and determination of the above-entitled matter before said Referee.

Dated: This 18th day of June, 1951.

/s/ EDWARD P. MURPHY,
District Judge

[Endorsed]: Filed June 18, 1951.

[Title of District Court and Cause.]

RULE TO SHOW CAUSE

At San Francisco, California, in said District, on the 18th day of June, 1951.

Upon the Annexed Petition of G. L. Thompson, the Trustee of the estate of the above-named Bankrupt, verified the 5th day of June, 1951, and filed on the 18th day of June, 1951;

It Is Hereby Ordered that R. H. Dachner show cause before this Court in Room 609 Grant Building, 1095 Market Street, in the City and County of San Francisco, State of California, on the 26th day of July, 1951, at the hour of 2:00 o'clock p.m., or as soon thereafter as the matter may be heard, why an order should not be entered upon him requiring him to turn over to the said Trustee the funds set out in the said annexed petition, namely, the sum of $26,266.81, with interest; and,

It Is Further Ordered that service of this order and the annexed petition upon the said R. H. Dachner on or before the 28th of June, 1951, shall be sufficient.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy

[Endorsed]: Filed June 18, 1951.

[Title of District Court and Cause.]

ANSWER OF RESPONDENT TO PETITION FOR ANCILLARY ADMINISTRATION AND TO ORDER TO SHOW CAUSE WHY AN ORDER SHOULD NOT BE ENTERED REQUIRING RESPONDENT TO TURN OVER CERTAIN FUNDS

To Burton J. Wyman, Esquire, Referee in Bankruptcy:

R. H. Dachner, respondent herein, answers the petition of G. L. Thompson filed on June 18, 1951, praying for a turnover of certain funds, and respondent also answers the order requiring him to show cause why an order should not be made directing him to turn over certain funds, as follows:

First Defence

The petition fails to state a claim against respondent upon which relief can be granted.

Second Defence

This court lacks jurisdiction of the subject matter of the action in that respondent's claim to the funds here involved is an adverse and valid claim, which claim thereby ousts the Bankruptcy Court of the summary jurisdiction which the petitioner here seeks to invoke, to determine actual controversies over title to property not in the hands of the bankrupt.

Third Defence

Respondent denies each and every, all and singular, the allegations contained in paragraphs 7, 8,

11, 12 and 14 of the petition for ancillary administration.

With respect to the allegations contained in paragraph 13 of said petition, respondent admits that he secured the said Twenty-six Thousand Two Hundred Sixty-six and 81/100ths Dollars ($26,266.81) by execution on a judgment of the District Court for the Second Judicial District of Nevada, and that said judgment was reversed and remanded to said trial court by the Supreme Court of Nevada.

Respondent also alleges that the said trial court, on the remand of the case, entered a judgment of dismissal on the motion of plaintiff in said action (respondent herein) because the trial court found that the said action had been fully compromised and settled and that neither party had any claim against the other after said settlement. Said judgment of dismissal is now on appeal to the Supreme Court of Nevada and has been set down for oral argument before said court on September 4, 1951.

Fourth Defence

Respondent denies that Union Lead Mining and Smelter Company was insolvent on November 20, 1947 or at any time prior or subsequent thereto, and respondent also alleges that in any event he had no knowledge of the alleged insolvency of Union Lead Mining and Smelter Company, nor any reasonable cause to believe said corporation was insolvent or respondent's receipt of the sum obtained by execution would effect, or result in, a preference.

On the contrary, respondent alleges that on the

20th day of November, 1947 and for some time prior thereto he knew that Union Lead Mining and Smelter Company had, on the 27th day of August, 1947 sold all of its assets to Imperial Lead Mines, Incorporated for the sum of Two Hundred Seventy-five Thousand and no/100ths Dollars ($275,000.00).

/s/ HELLER, EHRMAN, WHITE & McAULIFFE,
Attorneys for Respondent

[Printer's Note: The Attached Petition for Ancillary Administration and Order is a duplicate set out at pages 3 to 10 of this printed Record.]

Acknowledgment of Service attached.

[Endorsed]: Filed July 20, 1951.

[Title of District Court and Cause.]

PETITION TO REVIEW REFEREE'S ORDER

To: The Honorable Burton J. Wyman, Referee in Bankruptcy:

The petition of G. L. Thompson, as Trustee in Bankruptcy of Union Lead Mining and Smelter Company, bankrupt, respectfully represents:

I.

Your petitioner is aggrieved by the order herein of the Honorable Burton J. Wyman, Referee in Bankruptcy, dated March 12, 1952, copy of which

order is annexed hereto, marked Exhibit A, and made a part hereof.

II.

That the time within which your petitioner might seek a writ of review from said order was duly and regularly extended by the aforementioned Referee in Bankruptcy until the 22nd day of April, 1952.

III.

The Referee erred in respect to said order in that the Referee received in evidence and considered respondent's Exhibit 1 (Transcript, p. 22), over petitioner's objection (Transcript, p. 20-21), and the Referee likewise erred in considering such exhibit for more than the limited purpose for which it was offered, namely:

> "For the judgment in the second case."
> (Transcript, p. 20).

IV.

That the Referee erred in receiving in evidence the respondent's Exhibit 2 (Transcript, p. 27), over the objection of petitioner made at (Transcript, p. 22), and in considering such exhibit for more than the limited purpose for which it was offered, namely:

> "To demonstrate * * * that there was no insolvency." (Transcript, p. 23);
>
> "And to show knowledge of the Trustee of the state court proceeding." (Transcript, p. 23.)

V.

That the Referee erred in respect to said order in that the only and sole basis for said order in fact rests upon such evidence erroneously received as set forth in the two preceding paragraphs hereof.

VI.

That the Referee erred in respect to said order in that the entire historical background, as set forth in the Referee's opinion commencing at page 4 thereof, down to and including line 10 of page 7 thereof, is wholly and entirely without support in the record of any evidence which the Court could lawfully consider.

VII.

That the Referee erred in failing to find, upon the uncontroverted evidence, that no appearance was ever made by the Trustee in any of the state court actions and that there was no order ever issued out of the Federal Court directing such appearance and that there was no order entered in either the bankruptcy or the reorganization proceedings allowing the Dachner claim to be litigated in the state court (Trustee's Exhibits 4, 5 and 6).

VIII.

That the Referee erred in respect to said order, in that said Referee found that said R. H. Dachner did not have under his control any part of the assets of the bankrupt subsequent to February 7, 1948; and in finding that no part of the assets of the bankrupt came into the actual or constructive possession of the said R. H. Dachner subsequent to the filing of the bankruptcy petition on Febru-

ary 7, 1948; and in failing to find that upon the reversal of the state court judgment on June 25, 1948, upon which judgment execution had previously been levied by the said R. H. Dachner on November 20, 1947, in the sum of $26,266.81, that that said sum of money instantly became an asset of the bankrupt and the said R. H. Dachner held it as constructive trustee.

IX.

That the Referee erred in respect to said order in his Conclusion of Law No. 1, that the said Court was without jurisdiction to proceed.

X.

That the Referee erred in respect to said order in his Conclusions of Law Nos. 2 and 3, to the effect that the petition should be dismissed and that the order to show cause based thereupon should be discharged.

XI.

That the Referee erred in respect to said order by holding in effect that the state court had the power, during the bankruptcy proceeding, to diminish the assets of the bankrupt estate by determining therein that a compromise had been affected by certain officers of the debtors, when the action was one in personam and no appearance had been entered by the Trustee in Bankruptcy in the state court proceeding, nor had the Trustee been directed to enter an appearance, nor had there been any order directing that the claim might be litigated in the state court.

XII.

That the Referee erred in respect to said order in that the Referee failed to find as a matter of fact that the respondent had in his possession the sum of $26,266.81, the assets of the bankrupt, and in failing to overrule the objections to summary jurisdiction.

Wherefore, your petitioner prays that said order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to bankruptcy, and that the Referee promptly prepare and transmit to the Clerk thereof his certificate thereon, together with a statement of questions presented and transcript of the evidence taken at the hearing, together with all exhibits therein offered; that said order be reversed and that respondent be directed forthwith to surrender possession of the said $26,-266.81, together with interest on said sum to your petitioner and that your petitioner have such other and further relief as is just.

/s/ ALEX L. ARGUELLO,
Special Counsel for G. L. Thompson,
Trustee in Bankruptcy
ROYAL A. STEWART and
RICHARD W. HORTON,
Attorneys for G. L. Thompson, Trustee in Bankruptcy for Union Lead Mining and Smelter Company, Bankrupt
/s/ By ROYAL A. STEWART,
Of Counsel for Trustee

Duly Verified.

EXHIBIT A

SUMMARY OF HISTORICAL BACKGROUND, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RELATIVE TO TRUSTEE'S "TURN-OVER" PROCEEDING HEREIN

This matter comes before this court, in the above entitled ancillary proceeding upon the issues (both factual and legal) raised by R. H. Dachner's answer and response to the petition of G. L. Thompson, as trustee in bankruptcy of Union Lead Mining and Smelter Company, and the order to show cause based upon said petition, by which said trustee seeks, in this ancillary, by a summary "turn-over" order, to get from the respondent, R. H. Dachner, the sum of $26,266.81.

From the entire record now before the court in the above entitled ancillary proceeding in bankruptcy, including the petition at this time pending herein, the answer and response to said petition, the exhibits offered and received in evidence, when the issues raised by said petition and said answer and response came on for hearing herein, and a copy of the opinion of the Supreme Court of the State of Nevada in the case of Union Lead Mining and Smelter Company, a Nevada Corporation, Appellant, vs. R. H. Dachner, Doing Business Under the Firm Name and Style of "Pacific Machinery & Engineering Company, Respondent, No. 3578, de-

Exhibit A—(Continued)

cided December 18, 1951,* the historical background of the litigation, out of which the ancillary bankruptcy proceeding grows is as follows:

On June 16, 1947, R. H. Dachner (who was, and is, the respondent mentioned in said case in the Nevada Supreme Court and who, as aforesaid, is the respondent referred to in the particular matter now before this court, in the above entitled ancillary proceeding) secured a judgment, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, in action No. 107708, Dept. No. 2, entitled, "R. H. Dachner, doing business under the firm name and style of Pacific Machinery & Engineering Company, Plaintiff, vs. Union Lead Mining and Smelter Company, a Nevada Corporation, Defendant," against the defendant mining and smelting company, in the sum of $25,467.07, with interest thereon at the rate of 7% per annum from May 22, 1947, until paid, together with costs and disbursements in the sum of $37.15.

During the month of July, 1947, Union Lead

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*Although the aforesaid opinion had not been rendered and filed when the aforesaid hearing was held before this court, relative to the relief sought through the above entitled ancillary proceeding in bankruptcy, said opinion subsequently was supplied the court by counsel for the herein respondent and there has been no objection to the use thereof interposed by counsel on behalf of the herein interested trustee.

Exhibit A—(Continued)

Mining and Smelter Company took its appeal to the Nevada Supreme Court.

On August 27, 1947, said mining and smelting company entered into a contract with Imperial Lead Mines, Inc., for the sale, to the latter, of all said mining and smelter company's mining property and assets, by the terms of which said sale Union Lead Mining and Smelter Company was to receive forty per cent of the capital stock of Imperial Lead Mines, Inc., and a note of $200,000. This agreement recognized that Union Lead Mining and Smelter Company had certain obligations which constituted liens against its properties and which were to be discharged by said mining and smelting company. If such liens were not so discharged, then they might be paid by Imperial Lead Mines, Inc., such payments to be credited against the sums due to said mining and smelting company. Among the obligations, so to be affected, was the Dachner judgment, then pending on appeal. There also were specified certain "production certificates" then outstanding, and being monetary obligations secured by trust deeds and also constituting charges against future production of the mines.

On November 20, 1947, Dachner successfully levied execution on the bank account of Union Lead Mining and Smelter Company in satisfaction of his aforesaid judgment, at that time still pending on appeal.

Certain of the production certificates of Union Lead Mining and Smelter Company were held by

Exhibit A—(Continued)

one Cowden and one Haskell, both of whom were stockholders of said mining and smelter company.

Imperial Lead Mines, Inc., entered into a contract relative to the asquisition of these certificates and stock holdings.

On November 21, 1947, Cowden and Haskell brought suit against Imperial Lead Mines, Inc., based upon the last mentioned contract, and, in said suit, prayed judgment in the sum of $24,600., and an attachment was levied against the bank account of Imperial Lead Mines, Inc.

Although the last mentioned suit was brought against Imperial Lead Mines, Inc., and was based on the last mentioned contract, yet, under the terms of the earlier contract between Union Lead Mining and Smelter Company and Imperial Lead Mines, Inc., the retiring of the production certificates remained primarily the obligation of Union Lead Mining and Smelter Company.

After the commencement of the last mentioned action, conferences were held between representatives of Union Lead Mining and Smelter Company and Imperial Lead Mines, Inc., and it was decided that, rather than oppose the last referred-to suit, the certificates, held by Cowden and Haskell, would be purchased by Union Lead Mining and Smelter Company, on the most favorable terms that could be secured by negotiation. A cashier's check, in the sum of $16,000., was procured by Union Lead Mining and Smelter Company, made payable to its president, Smoers. It then was decided that, in the

Exhibit A—(Continued)

negotiations with Cowden and Haskell, Union Lead Mining and Smelter Company would be represented by its vice-president, Blackwood. At the insistence of Ralph Morgali, the attorney for Imperial Lead Mines, Inc., a cashier's check then was exchanged for one payable to Blackwood, in order to assure and demonstrate Blackwood's authority to act for, and bind, Union Lead Mining and Smelter Company, in the negotiations and settlement.

On November 25, 1947, the settlement negotiations were held, in the office of Brown & Wells, Reno attorneys for Cowden and Haskell, said attorneys also being Dachner's attorneys. Those present at such settlement negotiations were Brown and Wells, Blackwood and Morgali. It there was agreed that the settlement would be for $20,235, which was more than $4,000 less than the aggregate sum sought by the action brought against Imperial Lead Mines, Inc., by Cowden and Haskell. In consideration of the settlement for the said sum of $20,235, Blackwood, as the aforesaid representative of Union Lead Mining and Smelter Company, agreed that the Dachner action, against Union Lead Mining and Smelter Company, be deemed settled for the sum of $26,266.81 received by Dachner as the result of the aforesaid levy of execution against the bank account of Union Lead Mining and Smelter Company, on November 20, 1947.

On November 26, 1947, Morgali returned to the office of Brown & Wells to carry out the terms of the settlement. He delivered the aforesaid Black-

Exhibit A—(Continued)

wood check in the sum of $16,000, together with a second check for the balance in the sum of $4,235 and, in return therefor, received the production certificates and the stock certificates. A telephone call was then made by Brown to W. E. Baldy who was the secretary of Union Lead Mining and Smelter Company, a member of its board of directors and one of its attorneys, informing said secretary, board member and attorney that the then pending appeal from the Dachner judgment was to be dismissed and Baldy thereupon, after checking with Blackwood, confirmed the fact that the settlement agreed upon, at the aforesaid negotiations, included the settlement of the Dachner action. O. M. Floe, a third member of the board of directors of Union Lead Mining and Smelter Company, also was consulted and approved the settlement and the dismissal of the appeal from the Dachner judgment which thereupon was dismissed by Baldy and Cowden and Haskell then dismissed their action against Imperial Lead Mining, Inc., with prejudice, and their attachment was released.

Union Lead Mining and Smelter Company had been represented by three attorneys, in the Dachner action, Baldy, William S. Boyle and Robert E. Berry, with Boyle acting as senior counsel. During the occurrences of the latter events hereinbefore set forth, Boyle had been seriously ill, had been hospitalized and, at the time of the happenings of the settlement events, was convalescing at his home. He had written Union Lead Mining and Smelter Com-

Exhibit A—(Continued)

pany asking to be relieved of his duties as its counsel. Before Baldy had taken any action, on behalf of Union Lead Mining and Smelter Company, with regard to the dismissal of said appeal from the judgment in favor of Dachner, Baldy had received a copy of the letter of Boyle asking, as aforesaid, to be relieved of his duties as counsel for Union Lead Mining and Smelter Company. The dismissal of said appeal, however, was directly contrary to the advice previously given by Boyle to Union Lead Mining and Smelter Company.

On learning of the aforesaid action taken, with regard the dismissal of the Dachner suit, Boyle summoned a majority of the officers and board members of Union Lead Mining and Smelter Company who thereupon, amongst themselves (with the aid of Baldy and Floe who reversed their former action) repudiated the last mentioned dismissal, repudiated Blackwood's action in including the settlement of the Dachner action as consideration for settlement of the Cowden-Haskell action against Imperial Lead Mines, Inc., and instructed Boyle to make a motion in the Supreme Court of Nevada for reinstatement of the appeal of Union Lead Mining and Smelter Company in the Dachner action.

No demand ever was made of Cowden, or Haskell, for the return of the money paid by Union Lead Mining and Smelter Company as the result of the aforesaid three-way settlement, nor was there any tender back of the production, or stock certificates.

Exhibit A—(Continued)

Boyle again became active as senior counsel for Union Lead Mining and Smelter Company and the above mentioned proposed motion for reinstatement was filed and duly made before the Nevada Supreme Court.

The sole question before the Supreme Court of Nevada (as specified in its opinion filed therein on December 18, 1951) was whether an authorized dismissal had in fact been accomplished.

The Nevada Supreme Court ordered reinstatement of said appeal, the reinstatement order, (according to the last mentioned opinion) reading:

> "Without passing up the general proposition of law as to the authority of junior counsel to dismiss an appeal contrary to the wishes of senior counsel * * * we are of the opinion that the reinstatement of the appeal will result in less danger of injustice to the parties."

According to the language of the aforesaid opinion, no reference whatsoever was made to the aforesaid negotiated settlement.

On February 7, 1948, Union Lead Mining and Smelter Company filed its voluntary petition in bankruptcy, in the United States District Court for the District of Nevada, the proceeding number being 743.

On February 9, 1948, the last mentioned court adjudged Union Lead Mining and Smelter Company a bankrupt.

On June 25, 1948, the Supreme Court of the State of Nevada, in the case of Union Lead Mining

Exhibit A—(Continued)

and Smelter Company, a Nevada Corporation, Appellant, vs. R. H. Dachner, etc., Respondent, No. 3499, reversed the judgment as the result of which said respondent (as plaintiff) had collected the aforesaid sum of $26,266.81 and the case was "remanded to the district court for a new trial * * * and pursuant to such amendments in the pleadings as may be allowed in the discretion of the court * * *"

In October 25, 1948, Union Lead Mining and Smelter Company, the above named bankrupt, filed, in the District Court of the United States in and for the District of Nevada, in the primary bankruptcy proceeding, and under the same number (743) a petition for corporate reorganization.

(As to what was done with regard to the primary bankruptcy proceeding between the date upon which the original petition seeking an adjudication of Union Lead Mining and Smelter Company as a bankrupt, i.e., February 7, 1948, and October 25, 1948, the date upon which said petition for corporate reorganization was filed, in the court of original jurisdiction, the record before this ancillary court fails to speak, except to the extent that, on February 9, 1948, the primary bankruptcy proceeding was referred to a referee in bankruptcy of the District Court having primary jurisdiction, and that, subsequently, and after July 28, 1949, the referee in bankruptcy, to whom the primary bankruptcy proceeding had been referred having died, said primary proceeding was referred to the present

Exhibit A—(Continued)

duly appointed, qualified and acting referee in bankruptcy of said court of primary jurisdiction.)

On March 8, 1949, as the result of further proceedings held in the aforesaid Second Judicial District Court of Nevada, in the aforesaid action numbered 107708 wherein the above named Dachner was plaintiff and Union Lead Mining and Smelter Company was defendant, the following judgment was entered:

"Whereas, the Honorable A. J. Maestretti made and ordered to be served the following decision in the above entitled matter:

"Decision of the Court

"The Court: In this case the remittitur of the Supreme Court stated:

" 'It is evident from what we have said that the judgment must be reversed and the case remanded for a new trial, as the pleadings and findings cannot be modified in this Court to meet the situation. It is accordingly ordered that the judgment and the order denying appellant's motion for new trial be, and the same hereby is, reversed and the case remanded to the District Court for a new trial in accordance with the views herein expressed, and pursuant to such amendments in the pleadings as may be allowed in the discretion of the Court and in accordance with any terms and conditions it may reasonably impose and whether made before such new trial or before submission of the cause in order to conform with the proofs. The appellant will recover its costs on this appeal.'

Exhibit A—(Continued)

"When the remittitur was received in this court and counsel appeared in court, the Court asked of counsel what if any amendments they wished to make to any of the pleadings; and none of counsel suggested any amendments, the plaintiff specifically standing upon his pleadings as they were in court.

"Consequently, the remittitur requirements for the allowance of amendments was voided by the action of counsel for the respective parties, who refused and still refuse to offer or make any amendments. This motion for dismissal of the action, therefore, was made by the party who prevailed at the initial trial; and inasmuch as neither of the litigants has suggested any amendments to their pleadings, it is not probable that a different result would be had in a new trial upon the same pleadings.

"The Court finds that it has jurisdiction to hear and determine the motion to dismiss.

"The Court further finds that the settlement was made between the parties as alleged in the motion and the affidavits in support thereof.

"The Court finds that the settlement was made without the presence of fraud or undue influence.

"The Court finds that the settlement was made between competent parties.

"The Court finds that the plaintiff herein and the Cowden-Haskell people did have legal reason to believe that Blackwood and Morgali and Baldy had the authority to enter into the agreement.

Exhibit A—(Continued)

"It is therefore ordered that the motion to dismiss is granted with prejudice.

"/s /A. J. Maestretti, District Judge

"Therefore in pursuance thereof,

"It is the judgment of the Court that the motion to dismiss the above-entitled action is granted with prejudice.

Done in Open Court this the 8th day of March, 1949.

"/s/ A. J. Maestretti, District Judge"

(The record before this ancillary court is silent as to what occurred in the original bankruptcy proceeding after the reorganization petition was filed on October 25, 1948, until January 8, 1951, when the referee in bankruptcy now, as then, acting in aid of and on behalf of, the bankruptcy court of original jurisdiction, caused notice to be given to the creditors of the above named bankrupt that because "no plan of reorganization had been submitted and approved within the time fixed by the Court, the Court upon the report of the Trustee* and upon notice and in pursuance of Section 236(l) of the Bankruptcy Act and other sections of said

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* The record before this ancillary court does not disclose whether the trustee, originally mentioned, was a trustee appointed in the primary bankruptcy proceeding before the petition for reorganization was filed, or was a trustee originally appointed while the primary bankruptcy proceeding was under the corporate reorganization provisions of the Bankruptcy Act.

Exhibit A—(Continued)

Act did on the 4th day of January, 1951, order that bankruptcy proceedings be proceeded with and the petition for reorganization under Section 127 of the Act be dismissed * * *")

On February 7, 1951, G. L. Thompson became the duly appointed, qualified and acting trustee of the estate in bankruptcy of the above named bankrupt.

(According to the certificates filed herein the record shows that no application has been made, either to the Judge of the court of primary bankruptcy jurisdiction, or to the referee in bankruptcy of such last mentioned court for any action to proceed in the state courts of Nevada.

On June 18, 1951, G. L. Thompson, as said last mentioned trustee in bankruptcy, filed in the above entitled court the petition for ancillary administration, and on the last mentioned date the above entitled matter was referred to the undersigned referee in bankruptcy for the purposes of hearing and determining the rights of the parties involved.

After setting forth certain jurisdictional matters which are of no concern of this court at this stage of the herein proceeding, the last mentioned petition contains, in substance, the following allegations:

That at the time the petition in bankruptcy was filed in the court of primary jurisdiction, i.e., on February 7, 1948, said R. H. Dachner had in his possession, or under his control $26,266.81, belonging to the bankrupt estate, which said R. H. Dachner received from the bankrupt on November 20, 1947,

That, at the time of the filing of the aforesaid

Exhibit A—(Continued)

original petition in bankruptcy, said R. H. Dachner had no claim adverse to the last mentioned trustee, to said sum of $26,266.81, and at most only had a colorable claim to said sum.

That said R. H. Dachner now (at the time of the filing of the aforesaid petition for ancillary administration in the above entitled court) has in his possession, or under his control the sum of $26,266.81.

That said last mentioned trustee has made demand upon R. H. Dachner for the surrender and possession of said sum of $26,266.81 and that said R. H. Dachner has failed and refused to comply with such demand.

That on November 20, 1947, R. H. Dachner obtained a lien upon said sum of $26,266.81, belonging to the bankrupt estate.

That, on November 20, 1947, Union Lead Mining and Smelter Company, the bankrupt, was insolvent.

That R. H. Dachner now (at the time of the filing of the petition for ancillary administration, as aforesaid) has in his possession, or under his control, the sum of $26,266.81, obtained by him, by reason of a lien hereinbefore and previously set forth, which lien was secured by the enforcement of an execution given on a judgment issuing out of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, which judgment was reversed by the Supreme Court of the State of Nevada, by a judgment entered in the last mentioned court on June 25, 1948.

That said R. H. Dachner obtained said sum of

Exhibit A—(Continued)

$26,266.81 in fraud of the provisions of the Bankruptcy Act.

The prayer of said petition for ancillary administration contains, among other things, that said R. H. Dachner be directed forthwith to surrender possession of said sum of $26,266.81, together with interest thereon, and that the last mentioned trustee have such other and further relief as is just.

In his answer and response to the last mentioned petition and the order to show cause based on said petition, R. H. Dachner avers, in substance, among other things:

That said petition fails to state a claim against respondent upon which relief can be granted.

That this court lacks jurisdiction of the subject matter of the action in that respondent's claim to the funds here involved is an adverse and valid claim, which claim thereby ousts the Bankruptcy Court of the summary jurisdiction which the petitioner here seeks to invoke to determine actual controversies over title to property not in the hands of the bankrupt.

That respondent, in his answer and response filed herein on July 20, 1951, denies, all and singular, as follows:

That, at the time of filing of the original petition in bankruptcy, R. H. Dachner had in his possession, or under his control, the sum of $26,266.81, belonging to the bankrupt estate, which said R. H. Dachner received from the bankrupt on November 20, 1947;

Exhibit A—(Continued)

That, at the time of the filing of said original petition in bankruptcy, said R. H. Dachner had no claim adverse to said last mentioned trustee, to said sum of $26,266.81, and at most only had a colorable claim to said sum;

That, on November 20, 1947, Union Lead Mining and Smelter Company, Bankrupt, was insolvent, and

That said R. H. Dachner obtained said sum of $26,266.81 in fraud of the provisions of the Bankruptcy Act.

In the third defense to summary proceeding, R. H. Dachner, in said answer and response, admits that he secured said sum of $26,266.81 by execution on a judgment of the District Court for the Second Judicial District of Nevada, and that said judgment was reversed and remanded to said trial court by the Supreme Court of Nevada.

In said answer and response, R. H. Dachner also set forth that said Nevada trial court, on the remand of the case, entered a judgment of dismissal on the motion of (R. H. Dachner) the plaintiff in the last mentioned action (the respondent herein) because the trial court found that said action had been fully compromised and settled and that neither party had any claim against the other, after the settlement. That said judgment of dismissal is now (on the date the answer and response was filed) on appeal to the Supreme Court of Nevada and has been set down for oral argument before said court on September 4, 1951;

Exhibit A—(Continued)

In his fourth defense to said Petition now before this ancillary court, R. H. Dachner denies that Union Lead Mining and Smelter Company was insolvent on November 20, 1947, or at any time prior, or subsequent thereto; and R. H. Dachner alleges that in any event he had no knowledge of the alleged insolvency of Union Lead Mining and Smelter Company, nor any reasonable cause to believe said corporation was insolvent, or respondent's (Dachner's) receipt of the sum obtained by execution would effect, or result in, a preference, but that, on the contrary, R. H. Dachner averred that on November 20, 1947, and for some time prior thereto, he knew that Union Lead Mining and Smelter Company had, on August 27, 1947, sold all its assets to Imperial Lead Mines, Incorporated, for the sum of $275,000.00.

The question as to whether, or not, this ancillary court, in a summary proceeding, has jurisdiction so to proceed came before this court on July 26, 1951, and evidence was offered and received. At the conclusion of evidence taking, counsel for the respective parties directly interested were directed to file briefs and such briefs have been supplied.

Subsequent to the filing of the aforesaid briefs, the Supreme Court of Nevada, on December 18, 1951, as aforesaid, rendered its opinion and judgment on the appeal of Union Lead Mining and Smelter Company from the judgment rendered in the hereinbefore mentioned Dachner action by the District Court of the Second Judicial District of

Exhibit A—(Continued)

Nevada, in and for the County of Washoe, as the result of which said opinion and the judgment simultaneously rendered, the lower court judgment of dismissal was affirmed.

FINDINGS

Based upon the record before the court, the court finds that, at the time the original petition in bankruptcy was filed in the United States District Court for the District of Nevada, i.e., on February 7, 1948, R. H. Dachner did not have in his actual, or constructive, possession any property whatsoever belonging to, or owned by, Union Lead Mining and Smelter Company, nor did R. H. Dachner have under his control, in any manner whatsoever, any such property, nor any part of the assets, or such bankrupt, nor, at any time subsequent to the filing of said original petition in bankruptcy, on February 7, 1948, as aforesaid has any of such property, or any part of the assets of said bankrupt, come into the actual or contructive possession of R. H. Dachner, nor has any of such property, or any part of the assets, of said bankrupt, come under the control of R. H. Dachner, subsequent to the filing date of the last mentioned bankruptcy petition.

This court therefore, concludes, as matters of law:

1. That this court is without jurisdiction to proceed upon the aforesaid petition filed, by the aforesaid trustee, in the above entitled court;

Exhibit A—(Continued)

2. That the last mentioned petition should be dismissed, and

3. That the order to show cause based upon said petition should be discharged.

It Therefore, Hereby Is Ordered:

1. That the court is without jurisdiction to proceed upon the petition filed, by the aforesaid trustee, in the above entitled United States District Court for the Northern District of California;

2. That the last mentioned petition be, and said petition is Dismissed, and

3. That the order to show cause, based upon the last mentioned petition be, and said order to show cause is, Discharged.

Dated: March 12, 1952.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy

[Endorsed]: Filed March 12, 1952.

[Endorsed]: Filed April 21, 1952.

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE RELATIVE TO REFEREE'S ORDER, DATED MARCH 12, 1952

To Honorable Michael J. Roche, United States District Judge for the Northern District of California:

On April 21, 1952, the above named trustee in bankruptcy caused to be filed in the above entitled matter, the following petition for review:

[Printer's Note: Petition for Review is set out at pages 15-19 of this printed Record.]

The original of the document in which is contained the order referred to in Paragraph I of the last mentioned petition, a copy of which is attached thereto, as "Exhibit A", is inserted herein and, in its entirety, reads:

[Printer's Note: Exhibit A is set out at pages 20-38 of this printed Record.]

The circumstances which ultimately gave rise to said petition for review, in brief, are as follows:

On June 18, 1951, the following verified petition for ancillary administration was filed in the above entitled court:

[Printer's Note: Petition for Ancillary Administration is set out at pages 3-7 of this printed Record.]

Thereafter, and also on June 18, 1951, the following "Rule To Show Cause", based upon the aforesaid petition for ancillary administration, was is-

sued by, and filed in, the office of the undersigned referee in bankruptcy:

[Printer's Note: Rule to Show Cause is set out at page 12 of this printed Record.]

Responsive to the aforesaid petition for ancillary administration and the aforesaid "Rule To Show Cause", the following answer was filed with the undersigned referee in bankruptcy, on July 20, 1951:

[Printer's Note: The Answer is set out at pages 13-15 of this printed Record.]

The issues, both legal and factual, as raised by said petition for ancillary administration, said "Rule To Show Cause" and the aforesaid answer, came on for hearing before the undersigned referee in bankruptcy, on July 26, 1951, Royal A. Stewart, Esq., of the firm of Messrs. Stewart & Horton, of Reno, Nevada, appearing on behalf of the aforesaid trustee in bankruptcy, together with Alex L. Arguello, Esq., of San Francisco, California, special counsel for said trustee, and C. W. Weinberger, Esq., representing the firm of Messrs. Heller, Ehrman, White & McAuliffe, appearing on behalf of the respondent R. H. Dachner.

At said hearing eight documents were introduced in evidence, six on behalf of said trustee, and two on behalf of said respondent. They, as hereinafter will appear herein are handed up herewith, as part of this certificate and report.

The matter then was submitted on briefs, and the briefs having been filed on behalf of the interested parties, and the undersigned referee in bankruptcy

having considered such briefs, in connection with the evidence presented made and filed the hereinbefore-set-forth order which is complained of in the aforesaid petition for review that now is placed before the District Court for hearing and consideration.

REFEREE'S NOTES

Because it may be helpful to the Judge called upon to deal with the aforesaid petition for review and the referee's certificate and report relative thereto, there is hereinafter incorporated into this certificate and report, the notes which were made by the undersigned referee in bankruptcy, in the course of the research deemed necessary in order to determine the questions under consideration. The copies of the aforesaid notes are as follows:

Note 1

"Bankruptcy proceedings do not, merely by virtue of their maintenance, terminate an action already pending in a non-bankruptcy court, to which the bankrupt is a party. Pickens vs. Roy, 187 U.S. 177; Jones vs. Springer, 226 U.S. 148; Straton vs. New, 283 U.S. 318."

Connell vs. Walker, 291 U.S. 1, 5; 54 S. Ct. 257, 258, 78 L. Ed. 613, 615.

"Upon the filing of a petition in bankruptcy the court is endowed with paramount authority under the Constitution over the bankrupt and his estate. Consequently it has power, pending the application for discharge, to restrain all suits against the debtor. The better order of procedure is, first, to direct the

attention of the court in which the suit is pending to the bankruptcy proceeding and to ask it to stay the suit until the application for discharge shall have been determined. A due sense of comity between state and federal courts dictates that the application should thus first be made to the state court. If proper relief is not granted there, the bankruptcy court, under the constitutional jurisdiction may enjoin the prosecution."

In re Innis (C.C.A. 7) 140 F. (2d) 479, 480 [Certiorari denied, 322 U.S. 736, 64 S. Ct. 1048, 88 L. Ed. 1569].

It appears, from the facts and circumstances present herein, that the trustee in bankruptcy, with knowledge of the action pending, in the Nevada courts, wherein the bankrupt and Dachner, the respondent herein, were involved (even to the extent of availing himself of the use of the rulings therein, so long as such rulings seemingly worked to his advantage, as such trustee), stood silently aloof and did nothing whatsoever, either to see to it that he (as such trustee) became an active participant in such state court proceedings, or that the courts of Nevada, if possible, should be made to cease and desist their activities, in connection with the bankrupt and Dachner, until the primary bankruptcy court had dealt with the rights of the bankrupt and/or trustee and Dachner. In other words, it appears that the trustee had three causes of action:

(a) He, as such trustee, at least could have attempted to intervene in the proceedings in the Nevada courts;

(b) He, as such trustee, could have asked the Nevada courts for a stay of proceedings, to allow the primary bankruptcy court to deal with the Dachner situation, or

(c) He, as such trustee, if the Nevada courts had failed to grant him a stay, could have at least attempted to have the primary bankruptcy court enjoin the proceedings in the Nevada courts, with regard to the Dachner matter.

In taking the position which the record herein shows that he did take, it seems that the trustee's attitude in allowing the Nevada courts to proceed as they did proceed, so far as Dachner was involved, inferentially, at least, consented to such court's procedure and hence, in this ancillary proceeding, is confronted, inescapably, with one of the time-honored maxims of jurisprudence, "He who consents to an act is not wronged by it."

It also appears that there is another maxim of jurisprudence which, at this time, well can be applied to the trustee's conduct, and that is, "The law helps the vigilant, before those who sleep on their rights."

It is to be remembered, as was said, In re Goetz, 289 F. 118, 120, by Honorable Maurice T. Dooling (a one-time judge of the United States District Court for the Northern District of California, then sitting in the United States District Court for Arizona): "The trustee need not intervene; but, if he does not, he is bound by the judgment to the

same extent that any party acquiring an interest in the properly pending suit is bound.''

As the record stands, it appears that the bankrupt and Dachner have had their days in court. If the trustee herein, by the lack of timely action has failed to avail himself of the different opportunities afforded him so to participate as to present his side of the controversy, he cannot now be heard to complain in this ancillary bankruptcy matter, in this pending summary proceeding.

Note No. 2

''A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. Thompson vs. Magnolia Co., 309 U.S. 478, 481. If the property is not in the court's possession and a third person asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto.' ''

Cline vs. Kaplan, 323 U.S. 97, 98, 99, 65 S. Ct. 155, 156, 89 L. Ed. 97, 99.

See also, In re California Paving Co. (D.C., N.D. Calif.) 95 F. Supp. 909, 911, [Affirmed (C.C.A. 9) 193 F. (2d) 647].

It appears, at this time, that there could be no clearer case of a bona fide claim to the money in controversy than that shown by the record herein, because—

(1) There is no question but Dachner originally

received the money as the result of an execution issued out of the Nevada court and that, regardless of the fact that subsequently the judgment, upon which said execution was based, was set aside on appeal, at all times since has held said money adversely to the bankrupt's estate, and (2) Dachner now holds such money, as his own, and not as any kind of trustee for the bankrupt's estate, by virtue of a settlement agreement which has the blessing of the Nevada Supreme Court (about which more is to be shown in a later note.)

Note No. 3

"* * * as to the test to be applied in determining whether an adverse claim is substantial or merely colorable, we are of the opinion that it is to be deemed of a substantial character when the claimant's contention 'discloses a contested matter of right, involving some fair doubt and reasonable room for controversy', Board of Education vs. Leary (C.C.A.) 236 F. 521, 527, in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense."

Harrison vs. Chamberlin, 271 U.S. 191, 194, 195, 46 S. Ct. 467, 469, 70 L. Ed. 897, 900.

See also, Bradley vs. St. Louis Terminal Warehouse Co. (C.C.A. 8) 189 F. (2d) 818, 824; Goggin vs. Consolidated Liquidating Corp. (C.C.A. 9) 190 F. (2d) 553, 554.

Note No. 4

What, in effect, the trustee herein is asking this court, acting in this ancillary proceeding in bankruptcy is to review, and, actually, in a measure, reverse the judgment of the Nevada Supreme Court. Such action cannot be taken by this court. "The United States District Court is of limited jurisdiction, 28 U.S.C.A. §371, and reviewing state court judgments is not of the powers granted."

Lyders vs. Petersen (C.C.A. 9) 88 F. (2d) 9, 10.

If it be contended that all the Nevada Supreme Court decided was that the dismissal order made in the lower Nevada Court be (as it was) affirmed, there is no escape from the answer that by such affirmance, the bankrupt and Dachner were placed in the same situation as they were at the time the settlement agreement among the bankrupt, Imperial Lead Mines, Inc., and Dachner, originally, was carried through, it being remembered that, according to the opinion announced by the Supreme Court of Nevada, in the second appeal, that court specifically pointed out that, as a part of said agreement (by which said Supreme Court specifically declared that the bankrupt benefited), the Dachner action against the bankrupt, in the Nevada courts, was settled for the sum secured by Dachner by the execution issued and levied in said last mentioned action, i.e., for the sum of $25,467.07.

See last referred-to Supreme Court Opinion, in action numbered 3578, wherein, at pages 6 and 7 of the certified copy of said opinion in the record herein, it is said:

"It is clear that Union benefited from the settlement and retained the benefits thereof while purporting to repudiate the agreement in part. The settlement must, then, be taken to have been ratified in whole."

See also, another statement from said opinion, pages 7 and 8 thereof:

"True, Dachner might have moved this court for dismissal of the appeal upon the ground of settlement and thus specifically directed the attention of the court to the moot status of the matter. However, if the fact of settlement was not presented to the court as a basis for action, neither was it concealed from the court. Thus it can hardly be said that Dachner had abandoned or waived his contention in relation thereto and his continuing with the appeal upon the merits cannot be said to have operated to nullify the settlement."

If under circumstances different from those present herein, it might be argued that, granting that because of the settlement agreement (in the absence of the primary bankruptcy proceeding) Dachner, by resting upon the terms of the settlement agreement favorable to him, placed himself in a successfully unassailable position, yet because of the commencement of said primary proceeding within four months subsequent to the receipt of the aforesaid sum paid him by reason of the aforesaid execution, there was a voidable preferential payment to him. Such an agrument, if made herein, would be without legal merit in this summary proceeding, first, because such a contention, over an ob-

jection to jurisdiction could not successfully be maintained in a summary proceeding and, secondly, because the preferential payment point was specifically, and properly, withdrawn from consideration herein, as is shown on page 8 of the Reporter's Transcript of Proceedings held on July 26, 1951.

Record Herein and Papers Handed Up Herewith

The record, so far as this summary proceeding is concerned, consists of the Petition for Ancillary Administration and the order of reference of the ancillary proceeding, to the undersigned referee in bankruptcy (the original of said petition and the original of said order being on file in the office of the clerk of the above entitled court) and also the following papers which are handed up herewith as a part of this certificate and report:

1. Rule To Show Cause;
2. Answer of Respondent, etc.;
3. Points and Authorities in Support of Trustee's Petition for Turnover Order;
4. Reporter's Transcript of Proceedings of July 26, 1951;
5. Points and Authorities in Support of Trustee's Petition for Turnover Order;
6. Brief of Respondent R. H. Dachner;
7. Reply to Respondent's Points and Authorities on Petition for Turnover Order;
8. Envelope containing Exhibits (offered and received at hearing of the aforesaid petition and rule to show cause, together with certified copy of opin-

ion of Nevada Supreme Court, in action numbered 3578, filed in said court on December 18, 1951).

Dated: September 24th, 1952.

Respectfully submitted,

/s/ BURTON J. WYMAN,
Referee in Bankruptcy

[Endorsed]: Filed September 24, 1952.

In the United States District Court for the Northern District of California, Southern Division

In Bankruptcy—No. 39,899

In the Matter of UNION LEAD MINING AND SMELTER COMPANY, Bankrupt.

G. L. THOMPSON, as Trustee in Bankruptcy of Union Lead Mining and Smelter Company, Bankrupt, Petitioner,

vs.

R. H. DACHNER, Respondent.

ORDER CONFIRMING ORDER OF REFEREE

It Is Ordered that the order of the Referee in Bankruptcy entered in the above-entitled cause on March 12, 1952, be and the same hereby is Confirmed.

Dated: January 23rd, 1953.

/s/ MICHAEL J. ROCHE,
Chief United States District Judge

[Endorsed]: Filed January 23, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that G. L. Thompson, as Trustee in Bankruptcy of Union Lead Mining and Smelter Company, Bankrupt, Petitioner hereinabove named, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from the Order of the District Court entered on the 23rd day of January, 1953, the Honorable Michael J. Roche presiding, wherein the Order of the Referee in Bankruptcy entered in the above entitled cause on the 12th day of March, was confirmed.

/s/ ALEX L. ARGUELLO,
Special Counsel for G. L. Thompson,
Trustee in Bankruptcy

Acknowledgment of Service attached.

[Endorsed]: Filed February 18, 1953.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS FOR APPEAL

Pursuant to Rule 19 of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, the Appellant sets forth below the points upon which he intends to rely on his appeal:

Point One: That the Honorable Michael J. Roche erred in confirming the Order of the Referee in

Bankruptcy entered on March 12th, 1952, in the following particular:

Point Two: That the Referee erred in failing to find, upon the uncontroverted evidence, that no appearance was ever made by the Trustee in any of the state court actions and that there was no order ever issued out of the Federal Court directing such appearance and that there was no order entered in either the bankruptcy or the reorganization proceedings allowing the Dachner claim to be litigated in the state court (Trustee's Exhibits 4, 5 and 6).

Point Three: That the Referee erred in respect to said order, in that said Referee found that said R. H. Dachner did not have under his control any part of the assets of the bankrupt subsequent to February 7, 1948; and in finding that no part of the assets of the bankrupt came into the actual or constructive possession of the said R. H. Dachner subsequent to the filing of the bankruptcy petition on February 7, 1948; and in failing to find that upon the reversal of the state court judgment on June 25, 1948, upon which judgment execution had previously been levied by the said R. H. Dachner on November 20, 1947, in the sum of $26,266.81, that that said sum of money instantly became an asset of the bankrupt and the said R. H. Dachner held it as constructive trustee.

Point Four: That the Referee erred in respect to said order in his Conclusion of Law No. 1, that the said Court was without jurisdiction to proceed.

Point Five: That the Referee erred in respect to said order in his Conclusions of Law Nos. 2 and

3, to the effect that the petition should be dismissed and that the order to show cause based thereupon should be discharged.

Point Six: That the Referee erred in respect to said order by holding in effect that the state court had the power, during the bankruptcy proceeding, to diminish the assets of the bankrupt estate by determining therein that a compromise had been effected by certain officers of the debtor, when the action was one in personam and no appearance had been entered by the Trustee in Bankruptcy in the state court proceeding, nor had the Trustee been directed to enter an appearance, nor had there been any order directing that the claim might be litigated in the state court.

Point Seven: That the Referee erred in respect to said order in that the Referee failed to find as a matter of fact that the respondent had in his possession the sum of $26,266.81, the assets of the bankrupt, and in failing to overrule the objections to summary jurisdiction.

/s/ ALEX L. ARGUELLO,
Special Counsel for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed March 11, 1953.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD FOR APPEAL

Appellant designates the following portions of the record as material to his appeal:

1. Order authorizing trustee to employ counsel filed in United States District Court for the District of Nevada, June 11, 1951.

2. Trustee's Petition for authority to employ Special Counsel.

3. Petition for Ancillary Administration filed June 18, 1951.

4. Rule to Show Cause filed June 18, 1951.

5. Order United States District Court for Northern District of California, Southern Division, signed by Honorable Edward P. Murphy filed June 18, 1951.

6. Answer to Petition for Ancillary Administration by Respondent.

7. Summary of Historical Background, Findings of Fact, Conclusions of Law and Order Relative to Trustee's "Turn-over" Proceeding Herein signed by Referee Burton J. Wyman, filed March 12, 1952.

8. Petition to Review Referee's Order filed April 21, 1952.

9. Certificate and Report of Referee Relative to Referee's Order, dated March 12, 1952. Signed by Referee in Bankruptcy, Burton J. Wyman filed September 24, 1952.

10. Order confirming Order of Referee. Signed

by the Honorable Michael J. Roche filed January 23, 1953.

11. Notice of Appeal filed February 18, 1953.

Exhibits

1. Trustee's Exhibit No. 1—Appointment of Frank W. Ingram, as Referee.

2. Trustee's Exhibit No. 2—Referee's Certified Record of Proceedings.

3. Trustee's Exhibit No. 3—Copy of Judgment, Dachner vs. Union Lead Mining and Smelter Company, No. 107708.

4. Trustee's Exhibit No. 4—Certificate of Clerk of the Second District Court, State of Nevada.

5. Trustee's Exhibit No. 5—Certificate of Referee in Bankruptcy in Nevada.

6. Trustee's Exhibit No. 6—Certificate of Clerk of United States District Court of Nevada.

/s/ ALEX L. ARGUELLO,
Special Counsel for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed March 11, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below,

are the originals filed in the above-entitled case and that they constitute the record on appeal herein as designated by the attorney for the appellant:

Petition for ancillary administration, filed June 18, 1951.

Order referring matter to Referee, etc., filed June 18, 1951.

Rule to show cause.

Answer of Respondent to petition for ancillary administration.

Petition to review Referee's order, with copy of Referee's order attached.

Certificate and Report of Referee relative to Referee's order, dated March 12, 1952.

Order confirming order of Referee, filed January 23, 1953.

Notice of Appeal.

Appellant's statement of points for appeal.

Appellant's designation of record on appeal.

Trustee's Exhibits 1 to 6.

Respondent's Exhibits 1 and 2.

Opinion of Supreme Court of the State of Nevada.

Certificate of Clerk, Supreme Court, dated July 19, 1951.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 17th day of March, 1953.

[Seal] C. W. CALBREATH,
Clerk

[Title of District Court and Cause.]

RESPONDENT'S DESIGNATION OF RECORD FOR APPEAL

Respondent designates the following portions of the record as material to his appeal:

1. Respondent's exhibits.
2. Reporter's transcript of proceedings of July 26, 1951.
3. Referee's notes are to be included with Certificate and Report of Referee Relative to Referee's Order, dated March 12, 1952, signed by Referee in Bankruptcy, Burton J. Wyman, filed September 24, 1952.

/s/ CASPER W. WEINBERGER,
/s/ EUGENE S. CLIFFORD,
/s/ HELLER, EHRMAN, WHITE & McAULIFFE,
Attorneys for Respondent

[Endorsed]: Filed March 18, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD

I, C. W. Calbreath, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in the above-entitled matter, and that

they constitute a part of the record on appeal herein as designated by the attorney for the appellee:

Respondent's designation of record on appeal.

Reporter's transcript of July 26, 1951.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 18th day of March, 1953.

[Seal] C. W. CALBREATH, Clerk

In the Southern Division of the United States District Court for the Northern District of California.

No. 39,899

In the Matter of UNION LEAD MINING & SMELTER COMPANY, Bankrupt.

ANCILLERY PROCEEDINGS

Thursday, July 26, 1951

Before: Honorable Burton J. Wyman, Referee in Bankruptcy.

Appearances: For the Trustee: Royal A. Stewart, Esq., representing Messrs. Stewart & Morton, Reno, Nevada; and Alex L. Arguello, Esq., San Francisco, Special Counsel for Trustee. For the Respondent: C. W. Weinberger, Esq., representing Messrs. Heller, Ehrman, White & McAuliffe. [1*]

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* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Weinberger: We represent the Respondent to the Order to Show Cause today and have the opening statement. It is a complicated proceeding. If you would bear with me, I would like to state just what we expect to prove through witnesses and the introduction of documentary testimony.

The Referee: Is there any objection at this time, Counsel?

Mr. Stewart: I thought possibly the shoe might be on the other foot. I thought the trustee should make the opening statement. While he is required to show cause here, I think the trustee is required to make a prima facie case before we do anything else.

The Referee: That is, unless you are going to admit——

Mr. Weinberger: We are not going to admit anything.

The Referee: Let Counsel for the trustee make a statement.

Mr. Stewart: May it please the Court, in this matter the trustee's proof will show that R. H. Dachner, the Respondent herein, obtained a judgment against the bankrupt prior to the bankruptcy, on June 16, 1947, and levied execution and received on his levy of execution $26,266.81 on March 20, 1947.

The Referee: When was the petition filed, Counsel?

Mr. Stewart: In the District Court of Nevada.

The Referee: When?

Mr. Stewart: The petition in bankruptcy was

filed on February 7, 1948, and the adjudication in bankruptcy was two days [2] later.

The judgment upon which the execution was levied was appealed to the Supreme Court of the State of Nevada and during the bankruptcy proceeding and on June 25, 1948, the reversal of that judgment became final in the State Court by the issuing of a remittitur down to the District Court. In other words, reversing the judgment upon which the execution was levied.

I think this entire matter is purely a question of law. Our contentions in the matter are simply these: that the action in the State Court was an in personam action for money, judgment was obtained which was reversed. That immediately upon the reversal and the final remittitur coming down from the Supreme Court to the State Court during the bankruptcy proceeding, that Mr. Dachner, the respondent herein, became a constructive trustee then and there, holding in his hands the twenty-six thousand-odd dollars, which then and there was an asset of the bankrupt estate.

Our proof also will show that the trustee in bankruptcy—incidentally, there was an attempted reorganization in the bankruptcy. There was a bankruptcy petition in reorganization and bankruptcy again in the matter, but the proceeding has been commenced since the first petition in February of 1948—that the respondent then became a constructive trustee and that the State Court thereafter had no power whatsoever to divest the trustee of

these funds of which he was in constructive possession at that time. [3]

That is our case. We will have the authorities to support it. And our case will consist of introducing various certified copies of various records to show the procedure that took place in support of it. I am not going to argue the law at this time. I merely want to state the position of the trustee. The records also show, of course, that the District Court has jurisdiction and referred the matter to this Court. I think those matters are pretty well admitted in the Answer filed, so I won't go too greatly into it, but the meat of the question of law involved, I think, is whether or not the State Court had authority to divest the trustee of the funds, which we contend came into his possession under Section 75 of the Bankruptcy Act, because the State Court, in the other suits, the case will show, the State Court went ahead with the proceedings.

The Referee: Did the State Court have notice of all these bankruptcy proceedings?

Mr. Stewart: Apparently not. I have a certified copy of the record to show that neither the trustee in bankruptcy nor the trustee in reorganization ever entered an appearance in the State Court. No order was entered ordering the trustee to do anything, nor any petition filed or order made permitting the State Court to go ahead with the legislation.

The Referee: Not legislation.

Mr. Stewart: The litigation; I am sorry. In other words, the bankrupt apparently went right ahead just as though [4] the petition in bankruptcy

had not been filed and the bankruptcy trustee did nothing. There was no action taken at all. Our contention is that an in personam action such as this one, once the trustee becomes vested with this money—we say he did become vested with this money immediately the appeal was reversed—the State Court has no power during the bankruptcy, to divest him of possession. And the Respondent here, with due deference, in substance, their contention is that the Respondent did have possession. We contend, as you can see by the argument, our contention is the respondent had physical possession, yes, which he still has, but ever since the reversal from the Supreme Court, he held and still holds the money as trustee, constructive trustee for the bankruptcy estate.

The Referee: Do I understand that this writ was levied after the filing of the petition in bankruptcy?

Mr. Stewart: No, Your Honor. It was levied before and the reversal came during the bankruptcy.

The Referee: Make your statement at this time.

Mr. Weinberger: Yes, I prefer to do that, because one of our defenses is that we have moved to dismiss, in effect, and at the same time we don't wish anything we have done to be construed as a general appearance.

One of our contentions is that this is a real, adverse, not colorable claim to the property. Consequently, there is no summary jurisdiction, only plenary jurisdiction in the Court.

I would like to explain the statement of Counsel

as [5] to the proceedings in the State Court. Everything he has said is entirely true. So far as the reversal, which remanded, it was remanded for further proceedings in the trial court and further proceedings were held in the trial court and the trial court some six months or nine months after the remittitur came down in March, 1949, having heard evidence, taken testimony, entered judgment of dismissal and found as a fact that there was no longer any controversy and the matter had been settled, compromised, and paid by competent parties. That was the District Judge, Judge Maestretti, in the trial court in Nevada. Now, that judgment of dismissal and the findings of fact are now being received in the Nevada Supreme Court for a second appeal and that appeal is set down for argument in September, 1951. The matter is by no means finished, and there will be another decision by the Nevada Supreme Court and if the trial court is affirmed as, naturally, I believe it will be, then there will be nothing in the nature of the State Court's divesting the trustee of the funds; it will be an affirmed decision to the effect that the dismissal is proper and the matter has been compromised, settled, and paid by competent parties. Therefore, there is no question of a pending appeal or no question of a State court reversal, taking the funds away from the respondent.

I would like to go back just a moment to additional facts in the case. I think it would be best before your Honor. The petition in bankruptcy was filed, as has been noted, approximately thirteen days

short of four months after the execution [6] was levied. The execution was levied on November 20, 1947, and the debtor's petition in bankruptcy was filed by the President of Union Lead Mining & Smelter Company on February 7, I believe, or 8, of 1948. Now, I have been informed yesterday, unexpectedly to me, and I feel compelled in the interest of my client to say, that the gentleman who filed that petition, Mr. Somers, has been indicted by the Grand Jury in Nevada for filing a false petition. He has been tried once and is to be tried again, and the statements in the debtor's petition, we think will demonstrate conclusively when measured against the facts, that there was no insolvency at that time and there could be no insolvency when the execution was levied. Furthermore, Mr. Dachner, the respondent, had no reason to believe there was any insolvency or that the payment to him of that amount would result in a preference.

The Referee: As I understand, they are not raising the question of preference. You are saying that Mr. Dachner was the agent at the date of the reversal. Is that correct, Counsel?

Mr. Stewart: We are saying he became, by operation of law, a constructive trustee holding the funds, yes.

Mr. Weinberger: That could be true if there were a final reversal, but with the matter still pending——

The Referee: I was just pointing out that you mentioned a preference.

Mr. Weinberger: The petition speaks of a preference. [7] The petition, so far as can be told, develops the theory of either a preference or moneys secured by lien under a legal proceeding and therefore liable to be set aside. Not knowing the position, I thought it best to argue there was not a preference.

Mr. Stewart: We might save time there. At this time we are not claiming, even though there is an allegation in the petition, we are not claiming preference. We are relying simply on the constructive trustee theory and will offer no proof to show insolvency at the time the transfer was made. As a matter of fact, we believe that if we went on that theory, it would probably be a plenary and not a summary suit.

Mr. Weinberger: Of course, we are somewhat surprised at this statement, because we had anticipated from the petition that the entire argument was to be based on preference.

The Referee: That is eliminated.

Mr. Weinberger: I think that makes my task easier. I don't think there is the slightest possibility of a resulting trustee when the matter is still pending. I have, when we come to the authorities now or later——

The Referee: Let them put in their evidence, put in the evidence they are going to and whatever you can stipulate to. You might stipulate and save a lot of time probably.

Mr. Weinberger: I don't think there will be too much dispute about the facts. I did want to bring

out before I rested this opening statement that the proceeding, I think, should have [8] the background of the case, even though there are briefs; it is not to be argued. It is an extremely complicated matter we have felt.

The Union Lead Mining & Smelter Co. was sold to the Imperial Lead Mines, Inc., there was an agreement to sell all the assets to the Imperial Lead Mines, Inc., in August of 1947, approximately four months, or three months before the levy of the execution. The Imperial Lead Mines, Inc., promised, or the consideration was $75,000.00 cash, a promissory note for $200,000.00, secured by a deed of trust, and six hundred thousand shares of common stock of Imperial Lead Mines, Inc., all of which was to be paid to Union Lead Mining & Smelter Co., and in fact, was paid.

Mr. Stewart: Now, just a moment.

Mr. Weinberger: Well, the note was given, the cash paid, and the stock transferred. All the consideration promised was paid. I agree that the note has not been paid out; and the deed of trust was given. None of these assets, incidentally, were listed in the Union Lead's bankruptcy petition in February.

The Referee: Was it a voluntary petition?

Mr. Weinberger: It was a petition by the debtor, yes, sir, and which, obviously, was the reason for the criminal proceedings later. Another element of the sales agreement was that the Imperial Lead would assume the indebtedness and would retire the production certificates that were outstanding of

Union Lead Mining and Smelter Co., which constituted the great bulk of the [9] debts listed in the inventory and the debtor's petition filed short of the four months period. They were retired by cash payments and issuing new certificates. By the time of the filing of the petition, they were all retired and the assets far exceeded the liabilities as the subsequent petition shows. That was filed in October of 1948.

The Referee: Has there been any proceeding to set aside the bankruptcy proceeding itself?

Mr. Weinberger: No, the petition in reorganization was specifically stated to have been designed to supercede the debtor's petition filed in February, 1948. It was stated that a plan of reorganization would be prepared and presented to the Court forthwith; and some years passed and in February, 1951, a new notice of a first meeting of creditors was sent out in which it was stated that no plan had ever been presented; therefore, they would proceed with the original bankruptcy petition. I cannot, however, believe that the matter will be dismissed in view of the facts that have developed since, that I certainly want here today. But, that is the background of the matter, which on the actual case involved a judgment that was rendered. The facts are substantially as stated. Suit was brought by Mr. Dachner against Union Lead Mining & Smelter Co. based on the obtaining of services on a quantum meriut; there was a judgment and on appeal was reversed by the Supreme Court and remitted to the trial court with permission to amend

if the trial court thought proper. And mention was made of [10] Imperial Lead Mines, Inc., for the reason of showing, your Honor, what the actual facts of this settlement, compromise, and payment to Mr. Dachner were. Imperial Lead Mines, Inc., in purchasing, naturally, wanted all outstanding litigation cleared up. There were two suits, Mr. Dachner's on appeal and a suit involving Cowden and Haskell brought by the same counsel representing Mr. Dachner against both Imperial Lead Mines, Inc., and Union Lead Mining & Smelter Co., and the facts of that were that Imperial Lead Mines, Inc., had promised to take up and retire all production certificates. For some reason, $90,000.00 held by Cowden and Haskell had not been taken up. Consequently, they sued both companies to have them taken up. The matter was pending in November of 1947, when Imperial Mines, Inc., wished to go ahead with the sale and have the litigation cleared up. There was a compromise worked out between the gentlemen then representing Union Lead Mining & Smelter Co. Their former attorney had signed a specific withdrawal as counsel in all matters in which the company was concerned. And its new counsel, counsel for Imperial Lead Mines, Inc., and counsel for Mr. Dachner, and also for Cowden and Haskell agreed a settlement would be arranged. Some $16,000.00 was paid to Cowden and Haskell; Mr. Dachner was to be allowed to retain the money obtained on the satisfaction of his judgment and the appeal to be dismissed, and it was dismissed and the consideration passed. The

whole matter was compromised and settled. Then, some two weeks later the former counsel for Union Lead Mining & Smelter Co. moved in [11] the Supreme Court to reinstate the appeal; they did reinstate it and, as has been said, reversed it, sent it back to the trial court, and the trial court took testimony as to all this matter and found as a fact that the matter had been settled, compromised, and approved by competent parties on each side, nothing left in dispute, and granted Mr. Dachner's motion for dismissal; and it is that judgment that is now on appeal in the Nevada State Supreme Court, now set for hearing November 4, this year. For that reason, we don't feel there can be a constructive trustee asset or a final determination, since we think more than likely, or at least likely, that the second judgment will be affirmed and clearly, no constructive trustee is holding anything; simply, that Mr. Dachner is entitled to keep the money paid to him.

The Referee: Who is representing the appellee in the second suit, the one on appeal now?

Mr. Weinberger: The same counsel who has represented him all the way through, Ernest S. Brown. Mr. Dachner is the appellee. He won in the trial court both times.

The Referee: Who is representing the appellant?

Mr. Weinberger: In that suit? I don't know. Is it Mr. Boyle?

Mr. Stewart: No, Mr. Boyle is dead. The directors of Union Lead Mining & Smelter Co., apparently employed someone who has no connection

with the bankruptcy proceeding, who has been acting as counsel for Union Lead Mining & Smelter Co. We [12] don't know anything about it.

The Referee: Do you know, Counsel representing the trustee, why didn't the trustee give notice to the State Court of the pendency of the bankruptcy proceeding?

Mr. Stewart: Why didn't he get notice?

The Referee: Why didn't he give notice?

Mr. Stewart: I cannot answer that, Judge, for the reason that I came into the case rather late. There have been two trustees and the present trustee, upon the stay of the order in the reorganization proceeding, directing that the original bankruptcy be proceeded with, which I think was made sometime in February of this year, so that he came into the picture rather late on it, apparently that is the reason Mr. Dachner never petitioned the Court either to have the trustee made a party or for an order allowing him to proceed in the State Court. I don't know that either.

Mr. Weinberger: Counsel, continuing the supposing, seems to add to the weight that the trustee, taking over all the affairs of the bankrupt, has nothing to do with the prosecution of the appeal; that seems to raise a new question as to the competency of someone else to prosecute the appeal during the time the affairs of the bankrupt were in the hands of the trustee. It raises the question as to the authority of the appeal now being prosecuted. If that be true, I take it the judgment would be affirmed by the Court.

The Referee: Of course, I can understand that the trustee might not want to appear in that suit.

Mr. Weinberger: He might not feel it has any merit.

The Referee: Not necessarily that. He might not want to submit to the jurisdiction of the State Court.

Mr. Stewart: That is correct. Our position is that the decision of the Supreme Court will decide nothing. That is our position. We have authority to the effect that the decision of the State Court, if the Supreme Court makes a decision, will not affect the trustee's right to the money nor decide that Mr. Dachner even has a claim against the estate. That is our position.

The Referee: Gentlemen, can't you sit down and stipulate to the facts here?

Mr. Weinberger: I don't think there is any trouble about the facts, your Honor.

Mr. Stewart: All my evidence consists of documents with written authorities. I think he has the same thing. I don't think it will take me more than a couple of minutes.

Mr. Weinberger: I have a great deal of matter showing no preference, no fraud, no reasonable knowledge.

The Referee: I am going to say to both you gentlemen, I want all the facts. Then, I will give you a chance to brief it, so that you can summarize the law points involved.

Mr. Stewart: May I proceed now?

The Referee: Yes.

Mr. Stewart: The first document I am going

to offer [14] is the appointment of Frank W. Ingram as referee. You have admitted that, for the record?

Mr. Weinberger: Yes.

The Referee: Trustee's Exhibit No. 1.

(The document referred to was admitted in evidence as Trustee's Exhibit No. 1.)

[See page 96 of this printed Record.]

Mr. Stewart: The next document I am offering is a certified copy, certified by the Referee in Bankruptcy, of the debtor's petition with schedules attached.

Mr. Weinberger: This is the first one?

Mr. Stewart: Yes.

The Referee: Everything goes back to the date of the filing, anyway.

Mr. Weinberger: Of the first petition. I was confused by these first pages, which we do not have.

The Referee: Trustee's Exhibit No. 2.

(The Referee's Certified Record of Proceedings was received in evidence as Trustee's Exhibit No. 2.)

[See page 97 of this printed Record.]

Mr. Stewart: The next document I am offering in evidence is a photostatic copy of the judgment in the case of Dachner vs. Union Lead Mining & Smelter Co., No. 107708, Department No. 2, in the Second Division Judicial District Court of the State of Nevada in and for the County of Washoe; and of the execution, levy and remittitur from the Supreme Court of the State of Nevada, together with a memorandum of cases.

The Referee: Trustee's 3, and there will be a [15] notation on the back of this.

(The documents referred to were admitted in evidence as Trustee's Exhibit No. 3.)

[See page 112 of this printed Record.]

Mr. Stewart: The next document I offer in evidence is an exemplified certificate of the clerk, by the Clerk of the Second District Court of the State of Nevada, to the effect that no trustee in bankruptcy or trustee in reorganization ever entered an appearance or became a party to the State Court action.

Mr. Weinberger: Which number is this? This is the number of the first suit?

Mr. Stewart: Yes, the original suit.

The Referee: Trustee's No. 4.

(The Certificate of the Clerk of the Court referred to was admitted in evidence as Trustee's Exhibit No. 4.)

[See page 123 of this printed Record.]

Mr. Stewart: The next document is a Certificate of the Referee in Bankruptcy for the District of Nevada, to the effect that he has examined the files and finds that the respondent herein nor anyone on his behalf ever petitioned for authority to liquidate the claim in the State Court proceeding; that no order was ever made authorizing the respondent herein to liquidate his claim in the State Court proceeding.

Mr. Weinberger: I object to this, your Honor,

on the ground that it is incompetent, irrelevant and immaterial. The fact that execution was levied thirteen days prior to even this petition being filed, there was no duty whatever and would [16] have no bearing on the matter of what was done after the petition in bankruptcy was filed, when the execution had been completed.

Mr. Stewart: Our position is that the respondent was not relying on the first judgment; that is reversed. He is relying on the second judgment under the Supreme Court and that judgment was entered during the bankruptcy, so it becomes material.

The Referee: You mean, whether they appeared in the first suit?

Mr. Stewart: Whether they appeared at any time in the action.

The Referee: You are relying on the action taken by the Supreme Court in the first suit?

Mr. Stewart: Yes.

Mr. Weinberger: They are relying on the second.

The Referee: The objection is overruled. Trustee's No. 5.

(The Certificate of the Referee in Bankruptcy referred to was admitted in evidence as Trustee's Exhibit No. 5.)

[See page 126 of this printed Record.]

Mr. Stewart: The next document is the Certificate of the Clerk of the United States District Court of Nevada, practically to the same effect as the previous Certificate, in view of the fact that

these proceedings were partly reorganization and partly bankruptcy.

Mr. Weinberger: We will make the same objection to [17] that, your Honor, and the further objection that on this it says: "No order was ever made and entered authorizing Mr. Dachner to litigate his claim." He had fully litigated his claim prior to the bankruptcy. The proceedings afterward were remanded. I simply want to point out there was nothing left in controversy.

Mr. Stewart: I cannot stipulate to that. They are relying on the second judgment.

Mr. Weinberger: We are relying on the execution under the first judgment and the compromise that followed by five days the levy of the execution.

The Referee: Isn't that a matter of defense?

Mr. Weinberger: It is a matter of defense, but I don't think this in any manner refers to the proof of the case. I think the same objection goes to both documents.

The Referee: Objection may be overruled. Trustee's No. 6.

(The Certificate of the Clerk referred to was admitted in evidence as Trustee's Exhibit No. 6.)

[See page 127 of this printed Record.]

Mr. Stewart: I believe that is the Trustee's case.

(Trustee rests.)

Mr. Weinberger: If your Honor please, the first document we would like to introduce is the Certificate of Ned Turner, the Clerk of the Supreme

Court of Nevada, to the effect that an appeal is now pending on this case and set for oral [18] argument for Tuesday, September 4, 1951.

The Referee: That is the first?

Mr. Weinberger: The first appeal, disposed of, remanded to the trial court. This is the appeal from that.

The Referee: I will ask you: Are you going to put in the judgment of the District Court?

Mr. Weinberger: Yes, sir, the first judgment already has gone in. I propose to put the second judgment in now.

The Referee: I was wondering about the order. Wouldn't the judgment come before?

Mr. Weinberger: That, unquestionably, is right.

The Referee: It just keeps the exhibits in order.

Mr. Weinberger: What I can do, if your Honor would prefer, we have here a full certificate of all the records in connection with the evidence taken in this matter and——

The Referee: The first and the second?

Mr. Weinberger: The first and the second. This is not the whole record of the appeal in the first case, in a sense. It does not have the pleadings. What this document is, all certified by the Clerk, it consists, first, of an exhibit to the effect that relates to the settlement of the first case. That is, a certified check drawn by Mr. Somers, the President of the company, settling the offer made that I referred to; then, it has the order dismissing the appeal on stipulation following the settlement; it has the motion to reinstate and an order granting

the reinstatement of the appeal, [19] and it has the judgment; following then, the judgment of the trial court in the second case, and, finally, the certificate that it is pending. I don't know why it is made in this order, but the reason I want it is for the judgment in the second case. It has been bound all together; it came in that form. While it has some things that are relevant and some that are not, I would rather not separate it, because the certificate goes to the whole document.

Mr. Stewart: Without examining these documents, I assume the Clerk's Certificate covers everything in that.

Mr. Weinberger: That is my understanding. It was all in the same group.

Mr. Stewart: In order to be consistent with my theory, I have to make the objection that all the documents offered are irrelevant for the reason that they took place subsequent to the adjudication in bankruptcy and the State Court had no power to bind the trustee.

Mr. Weinberger: As to that, your Honor, your Honor directly pointed out that Counsel is relying on the judgment of the Supreme Court giving him the fund. From there on they were Nevada creditors.

Mr. Stewart: We do and we do not. Does that also contain the remittitur from the Supreme Court?

Mr. Weinberger: I don't know that it does. You have put it in.

Mr. Stewart: The judgment does not show the

remittitur [20] issued and it started with the remittitur. My objection goes to this upon that ground.

The Referee: Now, let's see. So far as you are concerned, from your point of view, you have shown the exact basis on which you stand; that is, that the remittitur has been handed down?

Mr. Stewart: Yes.

The Referee: This is in defense: That as part of the remittitur, the lower court was authorized to have a further hearing?

Mr. Weinberger: Yes. As a matter of fact, in the second judgment now on appeal, the trial court recites the remittitur as giving him power to hear the case again and then makes a judgment based on the remittitur and that judgment is on appeal.

The Referee: I am going to let Counsel make the objection, but I am going to overrule it.

Mr. Stewart: I understand that you have to, but to get the point before you.

The Referee: What is the objection, Counsel?

Mr. Stewart: The objection is that the documents offered are irrelevant and immaterial, for the reason that it all took place after the trustee became vested with the money and that the State Court had no power to alter the right of the trustee of the money.

Mr. Weinberger: The question of whether the trustee [21] was vested with the money is dependent on the final action of the State Court, not an intermediate action of the State Court. That has been our position from the start.

The Referee: The objection is overruled. This

will be Respondent's Exhibit No. 1, including all the exhibits.

[See page 128 of this printed Record.]

Mr. Weinberger: Thank you. I did not notice. Did your exhibit include the notice which recites the first meeting?

Mr. Stewart: No.

Mr. Weinberger: I would like that in. I have an extra copy of it, not certified, rather than cluttering the records of the Court with the whole petition. As a matter of fact, that is the corporate reorganization petition.

Mr. Stewart: Have you offered this?

Mr. Weinberger: No. I now offer as the next in order, the Referee's Certified record of the Proceeding, which includes the notice which recites the meeting of creditors, showing that no plan of reorganization was ever submitted under Chapter X, the debtor's petition for corporate reorganization filed in October, 1948; and included in this group of exhibits is also the Deed of Trust which was part security for the Imperial Lead Mines, Inc., purchase of Union Lead Mining & Smelter Co.; and at the back of it is another copy of the original petition. I don't like to add to the burden of the Court, but they are all bound together and certified together.

Mr. Stewart: Counsel for the trustee objects to the admission of the Deed of Trust and Petition for Reorganization [22] on the grounds that they are irrelevant in this proceeding. It occurs to me

that probably they had originally ought to have been offered in order to combat a claim of insolvency at the time of this transfer and since that is being waived, it occurs to me they are not admissible.

Mr. Weinberger: That certainly was the reason originally in obtaining it, but I think it is necessary for a complete record to demonstrate, despite Counsel's stipulation that there was no insolvency, so there is no possibility of claiming a preference.

The Referee: Isn't that behind us?

Mr. Weinberger: However, I say, if your Honor please, I want the record absolutely clear on it.

The Referee: If that is the only point——

Mr. Weinberger: That is not the only point, but this petition for corporate reorganization that was filed in October recites certain facts about the judgment and raises clearly and shows the trustee's knowledge of the remand to the District Court; and it shows that the proceedings were still open in the District Court of Nevada and the case was by no means finished. This is to defeat the claim that there was any possibility of a constructive trustee, because it demonstrates and bolsters the evidence already in to show what the remand was and shows that the trustee had full knowledge of the proceedings in the State Court. In fact, they had not terminated when the Nevada Supreme Court issued the first order. [23]

Mr. Stewart: May I inquire what trustee you are referring to? Trustee under the trust deed or the trustee in bankruptcy?

Mr. Weinberger: The trustee in bankruptcy. I take it the trustee has full knowledge of everything in the bankruptcy file. This petition for corporate reorganization is in the same bankruptcy file. The deed of trust, admittedly, is irrelevant, but it is bound with a clip. But I do want that. It recites the notice of the first meeting.

Mr. Stewart: I stand on the objection.

The Referee: Can't you separate it and put in anything that is relevant?

Mr. Weinberger: I will be glad to do that. It destroys the effect of the certificate to some extent.

The Referee: How about that, Counsel?

Mr. Stewart: No, we are going to object to the certificate calling for two things. Obviously, the party attesting to the record, certified to the correctness of them. That is all we are entitled to.

Mr. Weinberger: I will separate the deed of trust and ask that the remaining be admitted.

Mr. Stewart: My objection also went to the petition in reorganization.

The Referee: What about that? Is that offered in evidence?

Mr. Weinberger: Oh, yes, very definitely, because [24] that demonstrates the knowledge of all familiar with the file, including the trustee, that the remand from the Nevada Court did not conclude the proceeding. It indicates full knowledge on the trustee's part and full ability to appear and make any objection he wished in the proceedings. This is dated October, 1948.

The Referee: That became part of the record in the bankruptcy?

Mr. Weinberger: Yes, sir. This is designed on its face to supersede the bankruptcy.

Mr. Stewart: Our point is that the trustee in bankruptcy is not required to enter an appearance in any State Court proceeding unless the Bankruptcy Court orders him to do so; and regardless of the fact that he may have had knowledge that a State Court proceeding was going on, the State Court cannot compel him to come in.

The Referee: No, but might not the question arise, even though he does not have to appear if he does not want to, might not the question arise that he might be negligent in not doing it?

Mr. Weinberger: Not applying to the Court for an order.

The Referee: I cannot quite follow you, Counsel. I cannot go as far as you do. I can see your point. I can see that under certain circumstances probably you are correct in the statement of the law. [25]

Mr. Stewart: I think your contention would be correct if the State Court action were in rem, because, in an action in rem, the State Court takes possession of certain property and would have a right to bind the trustee in bankruptcy, certainly, if he had not taken part in the action. But, in an in personam action, we could cite cases where the trustee was allowed to stay out entirely and the State Court has no effect at all.

The Referee: Of course, doesn't that depend on the state of facts?

Mr. Stewart: Not in an in personam action, an in personam action commenced prior to bankruptcy and not finally disposed of until after bankruptcy; it does not bind the trustee in bankruptcy unless one of three things happens: He is ordered to defend; enters an appearance; or an order is entered allowing the matter to be litigated in the State Court. That can be done, too, none of which was done in this case.

Mr. Weinberger: We think it is exactly the same as if an executor of a decedent's estate knew of a suit pending against the deceased before his death, knew the matter was on appeal and took no further action. We think clearly, so far as the Court ordering the trustee to proceed, that has to be done on application of the trustee himself. So, knowledge, we think, in the trustee of the pendency of this proceeding and fact that the remand was for further proceedings and this was filed October, 1948, and further proceedings were held in January and February, 1949, we think it is all relevant as disputing the [26] idea of a claim of a constructive trust.

The Referee: The objection is overruled. That is Respondent's Exhibit No. 2.

(The group of documents referred to was marked Respondent's Exhibit No. 2.)

[See page 130 of this printed Record.]

Mr. Weinberger: If your Honor please, this copy has not been exemplified; I did not plan to use it. Of course, the argument would be made entirely

on the proof that this is the Notice of Motion of Mr. Dachner's counsel to dismiss the action after it came back from the Nevada Supreme Court the first time. It sets forth the grounds for his motion for dismissal and the facts surrounding the settlement and compromise of the case, which led Judge Mastretti to decide that the matter had been compromised.

The Referee: Did the trustee get notice of this?

Mr. Weinberger: So far as appears from the bankruptcy file in the debtor's petition for reorganization.

Mr. Stewart: The trustee did not. The trustee was not served with the notice.

Mr. Weinberger: No, he was not served with the notice, but the Union Lead Mining & Smelter Co. was and the attorneys of record were, and the petition shows that the trustee must have had knowledge that this matter was forwarded to the trial court for further decision.

The Referee: You say must have; upon what do you base that? [27]

Mr. Weinberger: Because, it was in the bankruptcy file, the petition for corporate reorganization shows that the matter was remanded to the Nevada trial court. I have no evidence that this notice of motion was served on the trustee; I don't know that it was; but the fact of further proceedings having been held in the case are apparent from the order of the Nevada Supreme Court and from the recitals in the corporate reorganization petition.

The Referee: Aren't you then bound by just the

records that appear in the bankruptcy matter, if you have no evidence of service on the trustee?

Mr. Weinberger: I am afraid I don't quite understand you.

The Referee: Well, you say that in Exhibit Respondent's No. 2, it shows that the trustee must have had knowledge.

Mr. Weinberger: Not of the motion to dismiss, but of the proceeding itself.

The Referee: Yes.

Mr. Weinberger: Yes.

The Referee: Can you follow that up without having served it on the trustee and it not being a part of the record in the bankruptcy proceeding?

Mr. Weinberger: What I had in mind in introducing this exhibit is to show additional facts of the settlement of the controversy; to show that the trial court in Nevada in ruling to the effect that the matter was settled, compromised [28] and fully paid demonstrates another ground for the retention of these funds. They were not taken only by judgment and execution; they were taken that way originally, and allowed to be retained by Mr. Dachner as the result of the compromise and payment settlement of the case, which the Court, in effect, found had taken place.

The Referee: Yes.

Mr. Stewart: I think I can solve the question here. The document he is offering is not admissible under any circumstances, because it is not authenticated.

Mr. Weinberger: No, it is not.

The Referee: He stated that.

Mr. Stewart: Aside from the fact whether the petition for corporate reorganization or any other matter shows that the trustee had notice, the trustee has notice now, but the question of time is important, too. Naturally, the trustee at the time this reorganization petition was filed by the bankrupt in the bankruptcy proceedings unquestionably was served with a copy of it. But, by that time all matters in the State Courts had gone by the board and it was too late for the trustee to do anything if he was of a mind to do so. So, the mere fact that they want to show that the bankrupt recites in the corporate reorganization petition certain things had taken place before, of course, can impute knowledge to the trustee, but the question is when he got the knowledge, and this is something that occurred prior thereto. [29]

Mr. Weinberger: Not prior. The petition was filed October, 1948, and this motion, I see, is September, 1948. I though it was later. But the fact is that knowledge of the case itself came from the original bankruptcy petition, and knowledge of the pendency of the case, it seems to me, by the trustee, did follow all the way through.

The Referee: Isn't that all you can prove, then, if you have not made service on the trustee?

Mr. Weinberger: We don't intend to bind the trustee so far as this is concerned. What we intend to show is that Mr. Dachner has two bases for retaining the money: One, he took it on the execution of a judgment, which had not been finally settled;

two, he took it under a settlement agreement and compromise, which is completely aside from the execution, under which he is entitled to retain it, unless it was a preference, which has been waived.

The Referee: Then, if you don't intend to bind the trustee, it is not competent.

Mr. Weinberger: Here, your Honor, is documentary evidence that tends to show the second basis for the retention of the funds. If all he did rely on was the judgment, possibly he should not. In other words the execution was on November 20; on November 25 all the parties knew, as this document shows.

The Referee: You say, all the parties knew.

Mr. Weinberger: The representatives. This is long before the bankruptcy, thirteen days short of the four months [30] period.

Mr. Stewart: I think the answer to that is that you cannot impeach the judgment of the Supreme Court. As of some time in 1948, almost a year subsequent to this claimed compromise, our contention is, that the judgment of the Supreme Court, insofar as it disposed of the issues at that time; in other words, if anything existed it is res adjudicata by reason of the judgment of the Supreme Court up to the time the remittitur came down.

Mr. Weinberger: Of course, your Honor, the Nevada Supreme Court only had the merits; the record was prepared before the settlement; the case was on appeal. The appeal was dismissed as part of the settlement. I am trying to show that on November 20th, Mr. Dachner took the funds by exe-

cution. On November 25, the parties—then the trustee was not a party, because it was not in bankruptcy—all the parties knew and agreed that Mr. Dachner should be allowed to retain the money taken on execution; Mr. Cowden would take a less amount; the appeal would be dismissed in Mr. Dachner's suit and everything would be wiped out, releases given, and everything agreed on was done. A few weeks later, another attorney who contended he really represented the company, came into the case; the Nevada Supreme Court reinstated the appeal; when it went back the second time, the Court found this settlement was made by competent parties representing the company at that time. That is on appeal now. And that gives another ground for the [31] retention of the funds.

The Referee: What is this document?

Mr. Weinberger: Notice of Motion that there would be an action filed by Mr. Dachner's counsel in Nevada after the remand came back. In other words, the remand to the trial court, the trial court regained jurisdiction; Mr. Dachner's counsel moved to dismiss on the ground that it was fully settled. The Court took the motion under advisement and decided for Mr. Dachner. This gives your Honor additional background as to why the judgment was given.

The Referee: Probably it would be very enlightening, but, I don't see how you can get it in if it is not part of this record, and the trustee did not get notice of it.

Mr. Weinberger: Your Honor, simply this: There

are other methods by which people are permitted to claim and retain funds paid by a person who is adjudged bankrupt within four months. If no question of preference is involved at all, no facts on which to base a preference, and I give your Honor $5,000.00 and within three and one-half months I go into bankruptcy, your Honor can retain that if there is no preference.

The Referee: The preference is out.

Mr. Weinberger: The preference is out, so, the payment by settlement, not by execution but by settlement, may be retained by Mr. Dachner, and this document is competent to show the payment by settlement as opposed to the payment by judgment.

Mr. Stewart: I disagree. The document is not competent [32] to prove anything. The only thing it is is a notice of motion and an affidavit by Mr. Dachner's attorney. A judgment in Nevada under the Nevada law, a judgment between two parties is res adjudicata not only as to the matters litigated, but whatever could be litigated, during the pendency of an appeal. If the case becomes moot during the pendency of the appeal, the party is obligated to move the Supreme Court to dismiss the appeal. If he don't, the judgment gets down where it will stand on the record. Aside from that, this document is not relevant to anything; it does not purport to be the action of the Court. It is merely a pleading filed with the State Court. We have already in evidence the action the State Court took in connection with this matter. That is relevant, not the argument used.

Mr. Weinberger: Anything that bears on the judgment of the trial court now on appeal is relevant, even if the judgment should be reversed. Nevertheless, the payment was made as the result of the compromise, not the execution. Both this and the next document, the brief of Mr. Dachner's counsel in support of the motion, explains why the trial court reached its decision and bears on that point and is relevant, showing the ultimate reasons.

The Referee: I will ask you, Counsel, are you actually relying on the fact that it is not authenticated?

Mr. Stewart: Yes, I am relying on that. I haven't the slightest idea or any way of verifying that it was filed [33] anywhere. Also I am relying on the objection that it is entirely irrelevant. In other words, if we introduce these two documents in the proceeding here, we will have a record that will take up your Honor's file, the Washoe County files, the debtor's appeal in this case, as well as the Supreme Court records; the answering brief comes into evidence. We will have on file a group of matters that won't help in deciding the case at all.

Mr. Weinberger: It is not authenticated. I would like, if possible, to have an opportunity to have it authenticated in Nevada.

The Referee: I am not going to deny you that, but I still cannot see where it is relevant under the conditions, when you admit the trustee was not served with notice and you are trying to hold the trustee. You have been permitted to put in your

exhibit holding him as these documents do, because they are part of the bankruptcy proceeding.

Mr. Weinberger: We are not trying to hold him; we are trying to hold onto the funds.

The Referee: I understand that, but the only way you can hold onto the funds is to have the Court hold by competent evidence that the acts of the trustee, either by commission or omission, placed him in the position where your client is entitled to hold onto the funds.

Mr. Weinberger: The preference is out, your Honor. The only basis for taking the funds back would be a constructive [34] trustee situation; that would be if the judgment is finally reversed. But, we have something much more than a judgment and execution; we have an agreement which the trial court found was made by competent parties.

The Referee: That is on appeal.

Mr. Weinberger: Yes, that is on appeal.

The Referee: Therefore, this Court cannot say that is a final judgment.

Mr. Weinberger: No, but evidence as to either basis for obtaining the funds is certainly relevant in a proceeding to reclaim funds by the trustee.

Mr. Stewart: Our point is, if the Court please, that the very matter he seeks to raise here is before the Court in connection with the judgment. In other words, the judgment is on appeal at the present time. In other words, if the State Court had authority to proceed, the judgment of the State Court in the second proceedings which has not yet been reversed, is determinative of the matter. In other words, if the State Court had the right to

bind the trustee, the judgment which has already been introduced in evidence, absolutely, unqualifiedly gives that right if the State Court had the right to interfere with the debtor's estate and take it away. The proceedings that went on in getting the second judgment are not relevant here and have no bearing.

The Referee: I think you are correct. In other words, what it would be, the result would be that this Court [35] would be retrying the case again after a judgment.

Mr. Stewart: I agree. I have agreed right from the very beginning that regardless of whether the State Court in this second case was right or wrong. I am not urging that here. If it had the power to do it, the trustee is going to lose in this action. In other words, if the State Court had the power to divest the trustee of funds after he was in the constructive possession of it, it does not make any difference in this proceeding whether he was right or wrong if it had the power to do such a thing.

Mr. Weinberger: For the record, do I correctly understand that your objection goes both to the legal authentication and the relevancy?

Mr. Stewart: That is correct. I have heard mention of the fact made that it was not final many times, but our position is that the first judgment lost all force and effect; that proceeding was terminated when the Supreme Court said the judgment was reversed. The fact that it remanded it and allowed a new trial does not affect the finality of

that first judgment. When the remittitur came down, that judgment was gone, wiped off the books entirely.

Mr. Weinberger: If your Honor please, we have Mr. Dachner here. I had planned to examine him on the question of the insolvency, his good faith in the matter and all questions of actually their insolvency. None of that is relevant.

The Referee: No. [36]

Mr. Weinberger: I wondered if your Honor cares to hear any testimony as to the state of the case, as to the compromise, as to the payment by settlement of the case, outside of the other basis?

The Referee: On Counsel's statement, he is practically relying on one theory.

Mr. Stewart: That is right.

The Referee: That the State of Nevada, after the filing of the bankruptcy, through any of its courts, had no jurisdiction to act.

Mr. Stewart: Jurisdiction to deprive the trustee of funds.

Mr. Weinberger: During the pendency of a proceeding of which the trustee has knowledge?

The Referee: I am not saying whether he is right or wrong. That is his theory. Therefore, there is no necessity for putting in evidence along that line.

Mr. Weinberger: The only thing, I don't like to labor the point, aside from any proceeding in the Nevada Courts whatever, going back to the original example: When I pay you $5,000.00 and go into

bankruptcy and no preference is alleged of any kind and cannot be, though it happens within the four months, you may retain that; and that is the other basis of our arguing that Mr. Dachner has the right to retain these funds. Consequently, I think everything that bears on the point that these funds, admittedly, were first taken under [37] execution, but he was allowed to retain them, long before the bankruptcy on account of the settlement; I think anything that bears on that bears out our second ground.

The Referee: Again then, you are asking me to try that Nevada case.

Mr. Weinberger: No, sir, we are not.

The Referee: Yes, you are.

Mr. Weinberger: We are asking your Honor only to hold that there is no basis for returning the funds to the trustee since they have been paid under the circumstances, in order to get the circumstances before your Honor.

The Referee: Doesn't it amount to this: If I follow, in the end, the theory advanced by counsel for the trustee, and he is right, that condition could not enter into it anyway?

Mr. Stewart: That is correct.

Mr. Weinberger: No, sir, because that theory is based on the lack of jurisdiction of the State Courts, and our second ground for the retention of these funds had nothing to do with any judgment or any order of any court.

Mr. Stewart: Just a minute. The second judg-

ment is based on the compromise. Is that correct?

The Referee: It is not in yet. If he is correct, then the payment would not enter into it. If he is not correct in his theory, then you don't have to worry about it.

Mr. Weinberger: We are not worried about it. I simply want to cover every possible avenue in the matter, but [38] I do think it is a very clear case for the retention of the funds on the ground that they were paid as a compromise of a claim without reference to a judgment. If the second judgment is reversed, I still think it is a valid reason for the retention of these funds, having been paid under the compromise, although admittedly within the four months.

Mr. Stewart: If it was made by the trustee in bankruptcy; if the trustee in bankruptcy received authority from the Court to compromise, there might be an argument on that point.

Mr. Weinberger: We do want to insist, and present again, the matter we presented in the issue; that is, we have raised the factual point on all these matters presented.

The Referee: Did you follow the federal procedure?

Mr. Weinberger: Yes, sir. We moved to dismiss in a formal motion; proved definitely that it was purely an adverse claim and there is no summary jurisdiction.

The Referee: I assure you of this: I will take up the factual matters first. If, after the hearing

of the factual question, I come to the conclusion that other evidence should be offered, I will give both sides an opportunity.

Mr. Weinberger: Then, you don't wish to hear from Mr. Dachner as to the circumstances?

The Referee: Not at this time. I am not precluding you from putting him on later after I have dealt with the factual question. [39]

Mr. Weinberger: That is entirely satisfactory, so we submit it on that basis.

The Referee: How many days do you want to brief it?

Mr. Stewart: We, on behalf of the trustee, will file the opening brief to make our position clear. I think we can file the opening brief in fifteen days.

Mr. Weinberger: I am going to be out of town practically all of August.

The Referee: Well, lawyers are very optimistic when they are in court as to how soon they can file. Generally, they don't get them in. Suppose I give you twenty, twenty and ten? When are you coming back?

Mr. Weinberger: About the 30th of August, your Honor. Can we have thirty, thirty and ten?

The Referee: Yes. The question of jurisdiction. You can brief it in its entirety.

Mr. Weinberger: That is, whether there is summary jurisdiction.

Mr. Stewart: I might say to the Court that I think the question of jurisdiction disposes of the entire matter.

The Referee: I do, too.

Mr. Weinberger: That is what we had in mind in our first and second defenses, your Honor.

The Referee: Yes.

(Submitted 30-30-10)

[Endorsed]: Filed April 4, 1952. [40]

TRUSTEE'S EXHIBIT No. 1

United States District Court for the District of Nevada

In the Matter of the Appointment of Frank W. Ingram, Referee in Bankruptcy

ORDER

The office of part-time Referee for the District of Nevada having become vacant by reason of the death of Referee Gray Mashburn May 29th, 1949, and this Court now having been advised by the Administrative Office of the United States Courts that the Judicial Conference has authorized filling the referee's position in this District and has changed the regular place of office of the referee from Carson City to Reno, Nevada,

It Is Hereby Ordered, pursuant to the aforesaid authorization of the Judicial Conference, that Frank W. Ingram, Esq., of Reno, Washoe County, Nevada, be, and he hereby is, appointed part-time Referee in Bankruptcy for the District of Nevada for the period of six (6) years from and after the date of this order, upon his taking and subscribing the oath

Trustee's Exhibit No. 1—(Continued)

of office and filing a good and sufficient bond in the sum of Two Thousand Five Hundred ($2,500.00) Dollars.

Dated this 28th day of July, 1949.

ROGER T. FOLEY,
United States District Judge

A true copy from the records. Attest:

[Seal] AMOS P. DICKEY, Clerk
/s/ By DAN MURPHY, Deputy

[Endorsed]: Filed July 30, 1949.

TRUSTEE'S EXHIBIT No. 2

In the District Court of the United States
for the District of Nevada

In Bankruptcy—No. 743

In the Matter of UNION LEAD MINING AND SMELTER COMPANY, A Nevada Corporation, Bankrupt.

REFEREE'S CERTIFIED RECORD OF PROCEEDINGS

Debtor's Petition in Bankruptcy with schedules attached filed February 1, 1948.

I, Frank W. Ingram, one of the Referees in Bankruptcy in and for said District do hereby

Trustee's Exhibit No. 2—(Continued)

certify the following to be the true and correct Referee's Record of Proceeding in the above entitled matter as referring to the above petition and schedules mentioned and as photostated in the office of the County Recorder of Washoe County, Nevada.

/s/ FRANK W. INGRAM,
Referee in Bankruptcy

DEBTOR'S PETITION

To the Honorable Roger Foley, Judge of the District Court of the United States of Nevada, District of Nevada:

The Petition of the Union Lead Mining and Smelter Company by and through its President, John H. Somers, the said Union Lead Mining and Smelter Company, a Corporation, residing at the office of Warren E. Baldy, Attorney, Carson City, County of Ormsby, State of Nevada, by occupation the President of the Union Lead Mining and Smelter Company, a Nevada Corporation, in the business of mining, respectfully represents:

1. Your petitioner, the Union Lead Mining and Smelter Company, a Corporation, has had its principal place of business and has resided at Steamboat, Nevada, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to

Trustee's Exhibit No. 2—(Continued)

surrender all the Corporation's property for the benefit of its creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all debts, and, so far as it is possible to ascertain, the names and places of residence of creditors, and such further Statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore, your petitioner prays that it may be adjudged by the Court to be a bankrupt within the purview of said Act.

/s/ JOHN H. SOMERS,
Petitioner, President of the Union Lead Mining and Smelter Company, a Nevada Corporation.
/s/ WILLIAM S. BOYLE,
Attorney

State of Nevada,
County of Washoe—ss.

I, John H. Somers, President of the Union Lead Mining and Smelter Company, by resolution

adopted by a majority of the Directors of said Corporation, the petitioner named in the foregoing petition, does hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ JOHN H. SOMERS,
Petitioner, by Resolution adopted by a majority of the Directors of the Corporation

Subscribed and sworn to before me this 5th day of February, A. D. 1948.

[Seal] /s/ WILLIAM S. BOYLE,
Notary Public, Washoe County, Nev.

Schedule A—Statement of All Debts of Bankrupt

Schedule A-1

Statement of all creditors to whom priority is secured by the act

Claims Which Have Priority	Amount Due or Claimed
(a) Wages due workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding $600 each, earned within three months before filing the petition.	
Warren E. Baldy—Attorney for Company	$10,000.00
William S. Boyle—Attorney for Company	10,000.00
P. H. McCarthy and F. Nason O'Hara, Balboa Building, San Francisco, California	5,000.00
Robert E. Berry, Virginia City, Nevada	1,000.00
John H. Somers—wages at $500.00 a month for 5 years	30,000.00
(b) Taxes due and owing to:	
(1) The United States	None
(3) State of Nevada	None
All taxes are paid as far as we know to date.	

Trustee's Exhibit No. 2—(Continued)

Claims Which Have Priority	Amount Due or Claimed
(c) (1) Debts owing to any person, including the United States, who by the laws of the United States is entitled to priority.	
None that we know of	None
(2) Rent owing to a landlord who is entitled to priority by the laws of the State of Nevada, accrued within three months before filing the petition, for actual use and occupancy.	
None	None
Total	$50,000.00

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,
/s/ JOHN H. SOMERS, Petitioner
President

Schedule A-2

Creditors Holding Securities

(N.B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Act of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

	Amount Due or Claimed
The following Certificates must be paid from 15% of Net Profit from mine, if any Profit is had, therefore it is speculative.	
Frank Haskell—Sharon, Conn.—Paid by preference	$90,000.00
Alma R. Cowden—Reno, Nev., Clay Peters Bldg.	15,000.00
Dorothy Cowden Borrell—Seattle, Wn.	15,000.00
Helen D. Cowden, Reno, Nev., Clay Peters Bldg.	20,000.00
Annetta B. Roffe—2499 Grand Ave., New York City, N.Y.	5,000.00
Harry D. Cowden—Reno, Nev., Clay Peters Bldg.	40,000.00

Trustee's Exhibit No. 2—(Continued)

	Amount Due or Claimed
O. M. Floe—539-10th St., Richmond, Calif. Paid $2,000	47,500.00
Elio Pagni—Steamboat, Nev.	1,500.00
William S. Boyle—Reno, Nev.	5,000.00
W. K. McMillan—711 Post St., S. F., Calif.	21,500.00
Erna Somers—Steamboat, Nev. Stock	50,000.00
Newton W. Craig—Box 22, Steamboat, Nev.	6,500.00
Adele Ferguson—630 Mason St., S. F., Calif.	5,000.00
Chas. D. Reynolds—729 Jones St., S. F., Calif.	500.00
Claire E. Weber—630 Mason St., S. F., Calif.	6,000.00
Verdon Garner—926 Masonic Ave., Albany	2,000.00
Gorden O. Garner—1219 Nelson St., Berkeley, Calif.	2,000.00
John H. Somers—Steamboat, Nev. Stock	84,000.00
Betty Walker—Carson City, Nev.	100.00
Warren E. Baldy—Carson City, Nev.	12,000.00
Florence E. Baldy—Carson City, Nev.	11,000.00
D. C. Randall & Norene Randell—Carson City	1,000.00
Luke Edwards—539-10th St., Richmond, Calif.	3,000.00
Donald A. Davis—539-10th St., Richmond, Calif.	1,500.00
Clift Garner	1,000.00
Garner	500.00
Joseph W. Johnson—Deeth, Nev.	2,200.00
Chester O. Woolsey—Medical Dental Building, San Francisco, Calif.	1,300.00
Anna Fleming—Steamboat, Nev.	1,000.00
Art Langan—Reno, Nev., 110 Rosa Circle, Westfield Village	1,000.00
E. H. Newdeck—3119 Carly Way, Sacramento, Calif.	1,500.00
George Jenison—Box 10, Steamboat, Nev.	2,000.00
Bert Donald Blackwood—P.O. Box 394, Lafayette, Calif.	26,500.00
Transferred from H. D. Cowden, 9,000 shares	
Transferred from J. H. Somers, 7,000 shares	
Transferred from Dorothy C. Borrell, 8,000, 2,500 shares	
John H. Somers—Steamboat, Nev.	21,600.00
Doris I. Blackwood—P.O. Box 394, Lafayette, Calif.	15,000.00
Transferred from Dorothy Cowden, 2,000 shares	
Transferred from H. D. Cowden, 13,000 shares	
E. H. Bath—Carson City, Nev.	1,300.00

Trustee's Exhibit No. 2—(Continued)

	Amount Due or Claimed
Bert Donald Blackwood, 2,500 shares	24,500.00
Transferred from Helen D. Cowden, 15,000, 5,000 shares	
Transferred from Alma R. Cowden, 2,000 shares	
Bert Donald Blackwood, 8,000 shares	22,500.00
Transferred from Annetta B. Foffe, 3,000 shares	
Transferred from Harry Cowden, 2,000 shares	
Transferred from Alma Cowden, 5,000 shares	
Transferred from Annetta B. Roffe, 2,000 shares	
Transferred from Harry Cowden, 2,500 shares	
R. H. Dachner—461 Market St., S. F., Calif.	1,300.00
Transferred from C. O. Woolsey, 1,300 shares	
Cecil W. Hess—1242 Hawthorne St., Alameda, Calif.	1,000.00
Lee J. Paschich, 535 Sutter St., S. F., California	500.00
Transferred from John H. Somers, 500 shares	
Dr. Lloyd H. Garrison—315 Sutter St., S. F., Calif.	5,800.00
Transferred from H. D. Cowden, 5,800 shares	
John H. Somers— 41 $1,000.00 Certificates	41,000.00
John H. Somers—87 $500.00 Certificates	43,500.00
John H. Somers, 120 $100.00 Certificates	12,000.00
Total	$672,100.00

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,
/s/ JOHN H. SOMERS, Petitioner
President

Schedule A-3

Creditors Whose Claims are Unsecured

(N.B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

	Amount Due or Claimed
O. M. Floe—loan to Union Lead Mining and Smelter Company	$ 8,000.00
Fourth Street Tool Shop	125.00

Trustee's Exhibit No. 2—(Continued)

	Amount Due or Claimed
Warren E. Baldy	10,000.00
William S. Boyle	10,000.00
P. H. McCarthy and F. Nason O'Hara	5,000.00
Robert E. Berry—Virginia City, Nev	1,000.00
That on Nov. 19th, 1946, R. H. Dachner in Dept. 2, Case No. 107708, in an action entitled "R. H. Dachner, doing business under the firm name and style of "Pacific Machinery & Engineering Co.,—Plaintiff, vs. Union Lead Mining & Smelter Co., a Nevada Corporation,—Defendant", received a judgment in the sum of $25,407.00 and $37.15; That the said case is on appeal in the Supreme Court; That the plaintiff, Dachner, collected the money by execution thereby obtaining a preference in the sum of	25,407.00
and costs of	37.15
That a suit shall be commenced at once to repay the last two sums to the trustee in bankruptcy when appointed.	
John H. Somers, besides wages, loaned the Union Lead Mining & Smelter Company, a Corporation, $35,000.00 in money and money advanced for material purchased; originally the claim was $35,000.00 and John H. Somers was allowed a credit of $15,000.00, leaving due him	20,000.00
W. K. McMillan—wages	7,500.00
Total	$87,069.15

[Marginal note in longhand]: Sent Notices to: Gibson, F. G. 305-307 Hughes Bldg., 252 W. 1st St., Reno. Loaned Union account Bal. $2248.40 and per note 25.00. Handed him notice of 1st meeting of creditors.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner
President

Trustee's Exhibit No. 2—(Continued)

Schedule A-4

Liabilities on Notes or Bills Discounted Which Ought to be Paid by the Drawers, Makers, Acceptors or Indorsers

(N.B.—The dates of the notes or bills, and when due, with the names, residences and the business or occupation of the drawers, makers, acceptors or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars shall be stated as to notes or bills on which the debtor is liable as indorser.)

On page 2 are set forth moneys due on Production Certificates which are secured by a note and trust deed, in which Warren E. Baldy is trustee, and the Union Lead Mining and Smelter Company is the debtor and promisor of note.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner,
President

Schedule A-5

Accommodation Paper

(N.B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the debtor be liable as a drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Give same particulars as to other commercial paper.)

See prior pages setting forth Production Certificates secured by trust deed and promissory note.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner
President

Trustee's Exhibit No. 2—(Continued)

Oath to Schedule A

State of Nevada,
County of Washoe—ss.

I, John H. Somers, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all debts, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

/s/ JOHN H. SOMERS, Petitioner

Subscribed and sworn to before me this 5th day of February, 1948.

[Seal] /s/ WILLIAM S. BOYLE,
Notary Public, Washoe Co., Nevada.

Schedule B—Statement of all Property of Bankrupt

Schedule B-1—Real Estate

NONE

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner
President

Schedule B-2—Personal Property

(a) 300,000 shares of Imperial Lead Mines, Incorporated, stock, $1.00 par value stock was sold at 15 cents a share.

(b) Negotiable and non-negotiable instruments, and securities of any description, including stocks in incorporated companies, interests in joint stock companies, and the like (each to be set out separately). None.

(c) Stock in trade in ..... business of ..... at ..... of the value of.....: An office full of office furniture held in trust by H. Cowden, Clay Peters Building, Reno, Nevada.

Trustee's Exhibit No. 2—(Continued)

(d) Household goods and furniture, household stores, wearing apparel and ornaments of the person: None.

(e) Books, prints and pictures: None.

(f) Horses, cows, sheep and other animals (with number of each): None.

(g) Automobiles and other vehicles: None.

(h) Farming stock and implements of husbandry: None.

(i) Shipping and shares in vessels: None.

(j) Machinery, fixtures, apparatus and tools used in business, with the place where each is situated: None.

(k) Patents, copyrights and trade-marks: None.

(l) Goods or personal property of any other description, with the place where each is situated: None.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,
/s/ JOHN H. SOMERS, Petitioner
President

Schedule B-3—Choses in Action

(a) Debts due petitioner on open account: $200,000.00 to be paid to the Union Lead Mining and Smelter Company out of 15% of Net returns from mine production, which is speculative.

(b) Policies of Insurance: None.

(c) Unliquidated claims of every nature, with their estimated value: Furniture held in trust by Harry Cowden, Clay Peters Building, Reno, Nevada, value speculative—about $500.00.

(d) Deposits of money in banking institutions and elsewhere: None.

Total, $500.00.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,
/s/ JOHN H. SOMERS, Petitioner
President

Schedule B-4

Property in Reversion, Remainder, or Expectancy, including property held in Trust for the Debtor, or subject to any power or right to dispose of or to charge.

(N.B.—A particular description of each interest must be entered,

Trustee's Exhibit No. 2—(Continued)

with a statement of the location of the property, the names and description of the persons now enjoying the same, the value thereof, and from whom and in what manner debtor's interest in such property is or will be derived. If all, or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized as the proceeds thereof, and the disposal of the same, as far as known to the debtor.)

Particular Description	Estimated Value of Interest
Interest in land:	None
Personal Property: Office furniture in possession of Harry Cowden, Clay Peters Building, Reno, Nevada, value speculative—about	$500.00
Rights and powers, legacies and bequests	None
Total	$500.00

	Amount realized as proceeds of property conveyed
Property heretofore conveyed for the benefit of creditors	None
Portion of debtor's property conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, as far as known to debtor	None
Attorney's fees. Sum or sums paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy: A sum or sums of money have been paid to Brown and Wells which could be designated a considerable sum, but amount unknown. Paid within four (4) months sum about $10,000.00	$10,000.00
Total	$10,000.00

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner
President

Trustee's Exhibit No. 2—(Continued)

Schedule B-5

Property Claimed as Exempt from the Operation of the Act of Congress Relating to Bankruptcy

(N.B.—Each item of property must be stated, with its valuation, and, if any portion of it is real estate, its location, description and present use.)

Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption: None.

Property claimed to be exempt by State laws, with reference to the statute creating the exemption: None.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner
President

Schedule B-6

Books, Papers, Deeds and Writings Relating to Bankrupt's Business and Estate

The following is a true list of all books, papers, deeds and writings relating to petitioner's trade, business, dealings, estate and effects, or any part thereof, which at the date of this petition, are in petitioner's possession or under petitioner's custody and control, or which are in the possession or custody of any person in trust for petitioner, or for petitioner's use, benefit or advantage; and also of all others which have been heretofore, at any time, in petitioner's possession, or under petitioner's custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books: Several in office of Warren E. Baldy, First National Bank Building, Carson City, Nevada.

Deeds: In office of William S. Boyle, 335 Gazette Building, Reno, Nevada.

Papers: In office of William S. Boyle, 335 Gazette Build-

Trustee's Exhibit No. 2—(Continued)

ing, Reno, Nevada, various papers, court proceedings and documents.

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner
President

Oath to Schedule B

State of Nevada,
County of Washoe—ss.

I, John H. Somers, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all Petitioner's property, real and personal, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

/s/ JOHN H. SOMERS, Petitioner

Subscribed and sworn to before me this 5th day of February, 1948.

[Seal] /s/ WILLIAM S. BOYLE,
Notary Public, Washoe Co., Nevada

Summary of Debts and Assets

(From the statements of the debtor in Schedules A and B)

Schedule A.

1-a.	Wages	$ 56,000.00
1-b.	(1) Taxes due United States	None
1-b.	(2) Taxes due States	None
1-b.	(3) Taxes due Counties, Districts and Municipalities	None
1-c.	(1) Debts due any person including the United States, having priority by laws of the United States	None
1-c.	(2) Rent having priority	None
2.	Secured claims	672,100.00

Trustee's Exhibit No. 2—(Continued)

4.	Notes and bills which ought to be paid by other parties thereto	None
	Schedule A, total	$728,100.00

Schedule B.

2-a.	Cash on hand	$ 2,000.00
2-l	Other personal property, Office Furniture	500.00
	Schedule B, total	$ 2,500.00

UNION LEAD MINING & SMELTER COMPANY,
a Corporation,

/s/ JOHN H. SOMERS, Petitioner,

President.

[Endorsed]: Filed Feb. 7, 1948.

TRUSTEE'S EXHIBIT No. 3

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe

No. 107,708

R. H. DACHNER, doing business under the firm name and style of "Pacific Machinery & Engineering Company," Plaintiff,

vs.

UNION LEAD MINING AND SMELTER COMPANY, a Nevada Corporation, Defendant.

JUDGMENT

The above entitled action coming on regularly for trial, before the above entitled court sitting without a jury, a trial by jury having been waived by the parties hereto.

The plaintiff, appeared personally and by his Attorneys, Brown and Wells, and the defendant filed a verified answer and cross complaint in said action and appeared by its Attorney, William S. Boyle, and said cause coming on for trial and all the pleadings herein; thereupon evidence was introduced in said cause by plaintiff and defendant and the matter was submitted to the court for its decision, and the court having heretofore filed its decision, and the court having heretofore filed herein its opinion, and Findings of Fact and Conclusions of Law, wherein it finds for the plaintiff and against the defendant and awarded judgment to plaintiff

Trustee's Exhibit No. 3—(Continued)

in the sum of Twenty Five Thousand Four Hundred Sixty-Seven and Seven One Hundredths Dollars ($25,467.07), and plaintiff's costs of suit.

Now Therefore, by reason of the law and said findings it is Ordered and Adjudged that plaintiff, R. H. Dachner, do have and recover of defendant, Union Lead Mining and Smelter Company, the sum of Twenty Five Thousand Four Hundred Sixty-Seven and Seven One Hundredths Dollars ($25,-467.07), lawful money of the United States, with interest thereon at the rate of seven per cent (7%) per annum from the 22nd day of May, 1947, until paid; together with costs and disbursements in the sum of Thirty Seven Dollars and Fifteen Cents ($37.15).

Done in Open Court this 16th day of June, 1947.

/s/ A. J. MAESTRETTI,
District Judge

[Endorsed]: Filed June 16, 1947.

EXECUTION

The State of Nevada,

To the Sheriff of Washoe County, Greeting:

Whereas, on the 16th day of June, A.D. 1947 R. H. Dachner, doing business under the firm name and style of "Pacific Machinery & Engineering Company", Plaintiff, recovered a judgment in the Second Judicial District Court, of the State of Nevada, in and for Washoe County, against De-

Trustee's Exhibit No. 3—(Continued)

fendant, Union Lead Mining and Smelter Company, a Nevada corporation, for the sum of Twenty Five Thousand Four Hundred and Sixty Seven & 7/100 Dollars ($25,467.07) in lawful money of the United States, damages, with interest on $25,467.07 at the rate of 7 per cent per annum till paid, together with costs and disbursements amounting to the sum of $37.15, as appears to us of record.

And Whereas, the judgment roll in the action in which said judgment was entered is filed in the Clerk's office of said Court, in the County of Washoe and the said judgment was docketed, in the said Clerk's office, in the said County, on the day and year first above written; and the above stated sums are now actually due on said judgment.

Now You, the Said Sheriff, are hereby commanded to make the said sums due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment out of the personal property of said debtor, defendant above named, or, if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to said Defendant, Union Lead Mining and Smelter Company, a corporation, in trust or otherwise, on the day whereon said judgment was docketed, in the aforesaid county, or at any time thereafter; and make return to this writ within sixty days with what you have done endorsed thereon.

Witness, Hon. A. J. Maestretti, one of the Judges of the said Court, at the Court House in the County

Trustee's Exhibit No. 3—(Continued)

of Washoe, this 20th day of November, A.D. 1947.

Attest my hand and the Seal of said Court the day and year last above written.

[Seal] E. H. BEEMER, Clerk,
/s/ By H. K. BROWN, Deputy Clerk

Sheriff will collect of Amount of Judgment, $25,-467.07; Costs, $37.15.

Sheriff's Office,
County of Washoe, State of Nevada—ss.

I, Ray J. Root, Sheriff of Washoe County, Nevada, do hereby certify and return that under and by virtue of the within and hereunto annexed Writ of Execution by me received on the 20th day of November, A.D. 1947, I did, on the 20th day of November, A.D. 1947, levy upon all moneys goods, credits, effects, debts due or owing and all other personal property belonging to the within named defendant Union Lead Mining and Smelting Company, a Nevada corporation, in the possession or under the control of the Nevada Bank of Commerce, Reno, Nevada, said levy being made by delivering to the said Nevada Bank of Commerce a copy of said Writ of Execution annexed to a Notice of what was levied upon and demanding from them a statement.

I further return that on the 20th day of November, A.D. 1947, I received from said Nevada Bank of Commerce the sum of $26,266.81, which I

Trustee's Exhibit No. 3—(Continued)

have turned over to the Attorney's for Plaintiff and have taken their receipt for the same and I herewith return said Writ of Execution satisfied in the sum of $26,266.81, and unsatisfied in the sum of $148.30, as follows, to-wit:

Principal amount of Judgment.....	$25,467.07
Interest to date of Sale.....	777.44
Costs	37.15
Sheriff's Fee and Commission.....	133.45
	$26,415.11
Amount Received	26,266.81
Unsatisfied	$ 148.30

Dated this 3rd day of December, 1947.

RAY J. ROOT,
Sheriff of Washoe County, Nevada

/s/ By GEO. W. LOTHROP,
Under Sheriff

[Endorsed]: Filed Dec. 4, 1947.

Trustee's Exhibit No. 3—(Continued)

In the Supreme Court of the State of Nevada

No. 107,708

UNION LEAD MINING & SMELTER CO., a Nevada Corporation, Appellant,

vs.

R. H. DACHNER, doing business under the firm name and style of "Pacific Machinery & Engineering Co.", Respondent.

Appeal from the Second Judicial District Court in and for Washoe County, Nevada.

Hon. A. J. Maestretti, Judge.

Robert Emmet Berry, Esq., W. E. Baldy, Esq., and William S. Boyle, Esq., Attorneys for Appellant. Morgan, Brown & Wells, Esqs., Attorneys for Respondent.

REMITTITUR

No. 3499

This case came on regularly to be heard on the 18th day of May, A. D. 1948, it being a regular day of the April, A. D. 1948 term of this court, when William S. Boyle, Esq., of counsel for Appellant, and Ernest S. Brown, Esq., of counsel for Respondent, both being in court, were each duly heard in oral argument on the merits of the case for their respective clients.

Now, on this day, all and singular the law and

Trustee's Exhibit No. 3—(Continued)

the premises having been seen, heard and duly considered, and the court being fully advised in the law, files with the clerk of this court its opinion in writing by Badt, J., concurred in by Horsey, J., and Brown, D. J., to the effect:

"It is evident from what we have said that the judgment must be reversed and the case remanded for a new trial, as the pleadings and findings cannot be modified in this court to meet the situation. It is accordingly ordered that the judgment and the order denying appellant's motion for new trial be, and the same hereby is, reversed and the case remanded to the district court for a new trial in accordance with the views herein expressed, and pursuant to such amendments in the pleadings as may be allowed in the discretion of the court and in accordance with any terms and conditions it may reasonably impose and whether made before such new trial or before submission of the cause in order to conform with the proofs. The appellant will recover its costs on this appeal."

Note: Eather, C. J., being absent on account of illness, the governor commissioned Hon. Merwyn H. Brown, of the Sixth Judicial District Court, to sit in his stead.

Whereupon it is now ordered, adjudged and decreed that the judgment and order appealed from the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, in the

Trustee's Exhibit No. 3—(Continued)

above entitled case, be, and the same is hereby reversed and the cause remanded for a new trial.

Judgment entered this 25th day of June, 1948.

Attest: Ned A. Turner, Clerk.

State of California—ss.

I, Ned A. Turner, the duly elected and qualified Clerk of the Supreme Court of said State of Nevada, do hereby certify that the foregoing is a full and true copy of the Original Judgment of said Supreme Court in the following action: No. 3499, Union Lead Mining & Smelter Co., a Nevada Corporation, Appellant, vs. R. H. Dachner, doing business under the firm name and style of "Pacific Machinery & Engineering Co.," Respondent, as the same appears of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 12th day of July, A. D., 1948.

[Seal] /s/ NED A. TURNER,
Clerk of the Supreme Court of the
State of Nevada

Trustee's Exhibit No. 3—(Continued)

[Title of Supreme Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS

Days in District Court—May 27, 28, 29, 1947.

Clerk's Fees—		
In Supreme Court, Appeal	$25.00	
In District Court, Answer	10.00	$ 35.00
Filing Notice of Appeal in District Court		5.00
Witness Fees—		
John Somers, 3 days at $3.00	$9.00	
W. K. McMillan, 3 days at $3.00	9.00	
Erma Somers, 3 days at $3.00	9.00	27.00
Court reporter per diem (½)—$5.00 per day for three days		15.00
To Alice Warner—Transcript of Testimony		356.40
To Elwood Beemer—Transcript of Record		62.00
Total		$500.40

I hereby certify the foregoing bill to be just and correct, and that the filing fee in the Supreme Court of the same has been paid.

In Testimony Whereof, I have hereunto set my hand and the seal of the Supreme Court this 12th day of July, A.D. 1948.

[Seal] /s/ NED A. TURNER, Clerk

[Endorsed]: Filed June 23, 1948.

Trustee's Exhibit No. 3—(Continued)

In the Second Judicial District Court of the State of Nevada in and for the County of Washoe

[Title of Cause.]

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that I have compared the foregoing with the originals thereof, and that I am the keeper of said originals, keeping same on file in my office as the legal custodian, and keeper of the same under the laws of the State of Nevada, and I further certify that the foregoing copies attached hereto are full, true and correct copies of the following: Judgment of June 16th, 1947, Execution with Sheriff's Return, and Remittitur, and now on file and of record in my office.

I do further certify that the same have not been altered, amended or set aside, but are still of full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 24th day of July, A. D. 1951.

[Seal] /s/ E. H. BEEMER, County Clerk

I, A. J. Maestretti, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding

Trustee's Exhibit No. 3—(Continued)

magistrate thereof, that all of the said judges are placed by law on an equality as to authority; that E. H. Beemer, who has signed the annexed attestation, is the duly elected and qualified County Clerk of the County of Washoe, and was at the time of signing said attestation, ex-officio Clerk of said Court.

That said signature is his genuine hand writing, and that all of his official acts as such Clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of the law.

Witness my hand this 24th day of July, A. D. 1951.

/s/ A. J. MAESTRETTI,

One of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

State of Nevada,
County of Washoe—ss.

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that the Honorable A. J. Maestretti whose name is inscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 24th day of July, A. D. 1951.

[Seal] /s/ E. H. BEEMER,
County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

TRUSTEE'S EXHIBIT No. 4

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe

No. 107,708

R. H. DACHNER, doing business under the firm name and style of "Pacific Machinery & Engineering Co.," Plaintiff,

vs.

UNION LEAD MINING & SMELTER CO., a Nevada Corporation,

I hereby certify that I am the duly elected, qualfied and acting clerk of the above entitled Court, that I have the custody of all of the files, pleadings, orders and records of said Court, that I have examined the said files, pleadings, orders and records and do hereby certify that no Trustee in Bankruptcy and no Trustee in Reorganization, ever became a party to, or entered any appearance in the above entitled action.

July 21st, 1951.

/s/ E. H. BEEMER, County Clerk

I, E. H. Beemer, County Clerk and ex-officio

Trustee's Exhibit No. 4—(Continued)

Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that I have compared the foregoing with the original thereof, and that I am the keeper of said original, keeping same on file in my office as the legal custodian, and keeper of the same under the laws of the State of Nevada, and I further certify that the foregoing copy attached hereto is a full, true and correct copy of the As Per Attached Statement and now on file and of record in my office.

I do further certify that the same has not been altered, amended or set aside but is still of full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 21st day of July, A. D. 1951.

[Seal] /s/ E. H. BEEMER, County Clerk

I, A. J. Maestretti, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding magistrate thereof, that all of the said judges are placed by law on an equality as to authority; that E. H. Beemer, who has signed the annexed attestation, is the duly elected and qualified County Clerk of the County of Washoe, and was at the time of

Trustee's Exhibit No. 4—(Continued)

signing said attestation, ex-officio clerk of said Court.

That said signature is his genuine hand writing, and that all of his official acts as such Clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of the law.

Witness my hand this 21st day of July, A. D. 1951.

/s/ A. J. MAESTRETTI,

One of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

State of Nevada,
County of Washoe—ss.

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that the Honorable A. J. Maestretti, whose name is inscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 21st day of July, A. D. 1951.

[Seal] /s/ E. H. BEEMER,

County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

TRUSTEE'S EXHIBIT No. 5

In the District Court of the United States
for the District of Nevada

In Bankruptcy—No. 743 A-58-A

In the Matter of UNION LEAD MINING AND SMELTER COMPANY, Bankrupt.

CERTIFICATE OF REFEREE

I, Frank W. Ingram, do hereby certify that I am the duly appointed, qualified and acting Referee in Bankruptcy for the United States District Court for the District of Nevada, having custody of the files, pleadings and proceedings in the above-entitled matter; that I have examined the files, pleadings and proceedings in the above-entitled matter and do hereby certify that no application was ever made in the above-entitled proceeding by R. H. Dachner or by anyone else for authority to liquidate their claim in any State Court proceeding and that no order was ever made or entered in this proceeding authorizing the said R. H. Dachner or any other person to liquidate any claim in any State Court proceeding.

Dated at Reno, Nevada, this 24th day of July, 1951.

/s/ FRANK W. INGRAM,
Referee in Bankruptcy

TRUSTEE'S EXHIBIT No. 6

United States District Court for the
District of Nevada

No. A-58-A

In Reorganization under Chapter X of the
Bankruptcy Act

In the Matter of UNION LEAD MINING AND
SMELTER COMPANY, Debtor.

CERTIFICATE OF CLERK

I, the undersigned, do hereby certify that I am the duly appointed, qualified and acting Clerk of the above-entitled Court, having in my possession the files, pleadings and proceedings in the above-entitled matter.

That I have examined the files, pleadings and proceedings in my possession and do hereby certify that no application was ever made to this court by R. H. Dachner or anyone in his behalf or by any other person for authority to litigate the claim of R. H. Dachner in any State Court proceeding, and that no order was ever made and entered in the above-entitled proceeding authorizing the said R. H. Dachner to litigate his claim in any State Court proceedings.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the afore-

Trustee's Exhibit No. 6—(Continued)

said Court at Carson City, Nevada, this 24th day of July, 1951.

[Seal] AMOS P. DICKEY, Clerk
/s/ By O. F. PRATT, Chief Deputy Clerk

RESPONDENT'S EXHIBIT No. 1

In the Supreme Court of the State of Nevada

CLERK'S CERTIFICATE

State of Nevada—ss.

I, Ned A. Turner, the duly elected and qualified Clerk of Supreme Court of said State of Nevada, do hereby certify that I have custody of all records in connection with appeals taken from all District Courts in the State of Nevada to the Supreme Court. That I have examined my files and records thoroughly and have found two appeals wherein R. H. Dachner, doing business under the firm name and style of "Pacific Machinery & Engineering Company", is respondent and Union Lead Mining and Smelter Company, a Nevada Corporation, is appellant being cases No. 3499 and 3578 respectively and that in neither of said appeals has any trustee in bankruptcy or trustee in reorganization intervened or become a party or taken any part in the proceedings so far as the records in my office disclose.

In Witness Whereof, I have hereunto set my

Respondent's Exhibit No. 1—(Continued)

hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 17th day of July, A. D. 1951.

[Seal] /s/ NED A. TURNER,
Clerk of Supreme Court of the State of Nevada

CLERK'S CERTIFICATE

State of Nevada—ss.

I, Ned A. Turner, the duly elected and qualified Clerk of Supreme Court of said State of Nevada, do hereby certify that Case No. 3578 an appeal from the Second Judicial District Court Washoe County, Reno, Nevada, entitled Union Lead Mining & Smelter Co., a Nevada Corporation, Appellant, vs. R. H. Dachner, doing business under the firm name and style of Pacific Machinery & Engineering Co., Respondent, is pending in this Court and is set for oral argument for Tuesday, September 4, 1951, at the hour of 10:00 a.m.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 19th day of July, A. D. 1951.

[Seal] /s/ NED A. TURNER,
Clerk of Supreme Court of the State of Nevada

RESPONDENT'S EXHIBIT No. 2

In the District Court of the United States
for the District of Nevada

In Bankruptcy—No. 743

In the Matter of UNION LEAD MINING AND SMELTER CO., Bankrupt.

REFEREE'S CERTIFIED RECORD OF PROCEEDINGS

Of Certain Exhibits: Debtor's petition in bankruptcy filed February 7, 1948. Exhibits Deed of Trust dated September 25, 1947. Debtor's petition for corporate reorganization filed Oct. 25, 1948. Notice of recessed first meeting of creditors January 8, 1951.

I, Frank W. Ingram, one of the Referees in Bankruptcy in and for said District do hereby certify the following to be the true and correct Referee's Record of Proceedings in the above entitled matter.

/s/ FRANK W. INGRAM,
Referee in Bankruptcy

Respondent's Exhibit No. 2—(Continued)

In the Supreme Court of the State of Nevada

UNION LEAD MINING & SMELTER CO., a Nevada Corporation, Appellant,

vs.

R. H. DACHNER, doing business under the firm name and style of "Pacific Machinery & Engineering Co.," Respondent.

I, Ned A. Turner, Clerk of the Supreme Court of the State of Nevada, do hereby certify that I have compared the foregoing with the original thereof, and that I am the keeper of all said originals, keeping same on file in my office as the legal custodian, and keeper of the same under the laws of the State of Nevada, and I further certify that the foregoing copies, attached hereto are full, true and correct photostatic copies of the (1) Receipt—Ex. A; (2) Order Dismissing the Appeal Upon Stipulation, Case No. 3499 dated November 26, 1947; (3) Document filed November 26, 1947, signed by W. E. Baldy of counsel for Appellant Case No. 3499; (4) Affidavit in Support of Subpoena Duces Tecum filed December 13, 1947, Case No. 3499; (5) Notice of Motion and Motion to Reconsider Order Dismissing Appeal in the Above Entitled Matter, and for an Order Reinstating Above Entitled Appeal, Case No. 3499; (6) Affidavit and Petition in Support of Motion to Reconsider Order Dismissing Appeal and Petitions for an Order Reinstating the

Respondent's Exhibit No. 2—(Continued)

Appeal being Case No. 3499 in the above entitled Court; (7) Order Granting Motion to Vacate Order Dismissing Appeal, and Reinstating Appeal filed January 28, 1948, Case No. 3499; also attached hereto are full, true and correct copies of the (1) Judgment filed June 16, 1947; (2) Judgment filed March 8, 1949. (The last two documents being copies of respective judgments, appearing in Bill of Exceptions.) Supreme Court Case No. 3578 and now on file and of record in my office.

I do further certify that the same has not been altered, amended or set aside, but is still of full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 18th day of July, A.D. 1951.

[Seal] /s/ NED A. TURNER,
Clerk of the Supreme Court

I, Milton B. Badt, Chief Justice of the Supreme Court of the State of Nevada, do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; that Ned A. Turner, who has signed the annexed attestation, is the duly elected and qualified Clerk of the Supreme Court of the State of Nevada.

That said signature is his genuine handwriting and that all of his official acts as such Clerk are entitled to full faith and credit.

Respondent's Exhibit No. 2—(Continued)

And I further certify that said attestation is in due form of law.

Witness my hand this 18th day of July, A. D. 1951.

/s/ MILTON B. BADT,
Justice of the Supreme Court of the State of Nevada

State of Nevada,
County of Ormsby—ss.

I, Ned A. Turner, Clerk of the Supreme Court of the State of Nevada, do hereby certify that Milton B. Badt, whose name is subscribed to the preceding Certificate, is the Chief Justice of the Supreme Court, elected and qualified, and that the signature of said Justice to said Certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 18th day of July, A. D. 1951.

[Seal] /s/ NED A. TURNER,
Clerk of the Supreme Court

Exhibit A—[In longhand]

Carson City, Nev.

Received of John H. Somers Cashier's Check No. 94-10/1212 for $16,000.00 to be used for settlement Haskell account with Union Lead Mining & Smelter Co.

Accepted above.

/s/ B. DON BLACKWOOD

Respondent's Exhibit No. 2—(Continued)

Office of Clerk of Supreme Court

Carson City, Nev., November 26, 1947

[Title of Cause No. 3499.]

ORDER DISMISSING THE APPEAL UPON STIPULATION

In Chambers: Present: Hon. Edgar Eather, C.J., Hon. Chas. Lee Horsey, J., Hon. Milton B. Badt, J.

Upon the written stipulation and request of Union Lead Mining & Smelter Co., Appellant, and with the written consent of R. H. Dachner, Respondent, duly filed here by their respective counsel, and good cause appearing therefor, It Is Hereby Ordered that Appellant's appeal from the judgment of the District Court and its appeal from the order of said Court denying its motion for a new trial, be and the same hereby are dismissed without costs to the Appellant.

Done at Carson City, Nevada, this 26th day of November, 1947.

Attest: Ned A. Turner, Clerk.

cc—Robert Emmet Berry, Esq., W. E. Baldy, Esq., William S. Boyle, Esq., Morgan, Brown & Wells, Esqs., John H. Somers, Esq.

[Title of Supreme Court and Cause No. 3499.]

The Appellant, Union Lead Mining & Smelter Co., a Nevada corporation, by and with the consent

Respondent's Exhibit No. 2—(Continued)

of Respondent, hereby dismisses with prejudice, the appeal heretofore taken by it in the above entitled cause, from a judgment rendered against it in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, for $25,467.07, and $37.15 costs, and from the order overruling defendant's—appellant herein— motion for a new trial; that said appeal be dismissed without costs to Appellant.

Dated this 26th day of November, 1947.

/s/ UNION LEAD MINING &
SMELTER CO.,
Appellant
/s/ W. E. BALDY,
Counsel for Appellant

[Endorsed]: Filed Nov. 26, 1947.

[Title of Supreme Court and Cause No. 3499.]

AFFIDAVIT IN SUPPORT OF SUBPOENA DUCES TECUM

State of Nevada,
County of Washoe—ss.

Ernest S. Brown, being first duly sworn, deposes and says:

That he is one of the attorneys for Respondent herein; that on the 26th day of November, 1947, this Honorable Court entered an order dismissing the above-entitled appeal at the request of Warren

Respondent's Exhibit No. 2—(Continued)

E. Baldy with the consent of Messrs. Brown & Wells, attorneys for Respondent; that Warren E. Baldy is one of the attorneys for Appellant herein.

That on or about the 6th day of December, 1947, one William S. Boyle did file herein a "Notice of Motion and Motion to Reconsider Order Dismissing Appeal in the above-entitled Matter, and for an Order Restraining above-entitled Appeal", supported by the affidavit of said William S. Boyle.

That prior to the dismissal aforesaid the aforesaid Warren E. Baldy, in a telephone conversation with your Affiant, which was heard by Robert W. Wells, one of the attorneys for Respondent herein, did advise your Affiant that the said William S. Boyle had resigned as a director of the Appellant herein and did withdraw as its counsel in this matter; that in support of said statement the said Warren E. Baldy did purport to read to your Affiant a telegram, or letter, received by him from the said William S. Boyle to the aforesaid effect; that your Affiant is informed and believes, and therefore avers the fact to be, that the said William S. Boyle was not one of the attorneys for the Appellant at the time of filing herein a "Notice of Motion and Motion to Reconsider Order Dismissing Appeal in the above-entitled Matter, and for an Order Reinstating above-entitled Appeal", and the affidavit aforesaid; that to prove said fact your Affiant at the hearing of said motion desires to cross-examine Warren E. Baldy aforesaid as an adverse witness

Respondent's Exhibit No. 2—(Continued)

and to present to the consideration of this Honorable Court his testimony regarding the dismissal aforesaid and the telegram, or letter, aforesaid if the same was received by the said Warren E. Baldy.

That relying upon the aforesaid dismissal, the said judgment obtained in the lower court was satisfied, the moneys have been disbursed by the Respondent, and that a grave injustice would result to him if he were required to again impound this sum of money for the purpose of awaiting the outcome of any order reinstating the appeal in this particular matter. That the dismissal of said appeal was also a consideration of settlement of further litigation pending in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, which resulted in the dismissal of said litigation and the acceptance of certain sums of money from the Appellant in this matter by third parties in said litigation. That there appears nowhere in the affidavit or showing of purported counsel for Appellant, William S. Boyle, that he had any special lien or contract with the Appellant concerning the prosecution of the appeal thereon. That this has been settled controversy with prejudice, and an further proceedings herein will result in a moot question being presented to this Honorable Court.

Wherefore, your Affiant respectfully prays that a Subpoena Duces Tecum be issued by this Honorable Court, commanding and directing the attend-

Respondent's Exhibit No. 2—(Continued)

ance before this Honorable Court of Warren E. Baldy and the production by him of the telegram, or letter, aforesaid at the time and place set for the hearing of the Motion of William S. Boyle to consider order dismissing this appeal and for an order reinstating this appeal.

/s/ ERNEST S. BROWN

Subscribed and Sworn to before me this 12th day of December, 1947.

[Seal] /s/ ROBERT W. WELLS,
Notary Public in and for the County of Washoe, State of Nevada.

[Endorsed]: Filed Dec. 13, 1947.

[Title of Supreme Court and Cause No. 3499.]

NOTICE OF MOTION AND MOTION TO RECONSIDER ORDER DISMISSING APPEAL IN THE ABOVE-ENTITLED MATTER, AND FOR AN ORDER REINSTATING ABOVE-ENTITLED APPEAL

To R. H. Dachner, doing business under the firm name and style of "Pacific Machinery & Engineering Company", and to his attorneys, Brown & Wells, Reno, Nevada:

You, and each of you, will please take notice that the above-entitled appellant by and through

Respondent's Exhibit No. 2—(Continued)

its attorneys, William S. Boyle and Robert Emmet Berry, and other counsel appearing for counsel in case of sickness or emergency, will on Monday, December 14th, 1947, at the hour of ten o'clock a.m., or as soon thereafter as counsel can be heard, move the above-entitled Supreme Court for the following order or orders;

1.

To set aside the order, dated November 26th, 1947, dismissing the above-entitled appeal.

2.

For an order of Court reinstating the appeal dismissed on the 26th day of November, 1947, and known as Case No. 3499.

That at the time of making this motion counsel will rely upon all papers on file in the above-entitled matter, and the Notice of Motion and Motion and the Affidavit and Petition in support of Motion to reconsider order dismissing appeal and Petitions for an order reinstating the appeal, being Case No. 3499 in the above Court, and oral argument of counsel.

Dated: December 6th, 1947.

/s/ WILLIAM S. BOYLE,
/s/ ROBERT EMMET BERRY,
Counsel for Appellants and Movant

Respondent's Exhibit No. 2—(Continued)

[Title of Supreme Court and Cause.]

AFFIDAVIT AND PETITION IN SUPPORT OF MOTION TO RECONSIDER ORDER DISMISSING APPEAL AND PETITIONS FOR AN ORDER REINSTATING THE APPEAL, BEING CASE No. 3499 IN THE ABOVE COURT

State of Nevada,
County of Washoe—ss.

Comes Now William S. Boyle, chief counsel for appellant in the trial of the Case before the District Court, and for the preparation and subsequent appeal of Case No. 3499 before the above-entitled Court, and respectively shows:

I.

That William S. Boyle filed the appeal in good faith, and the record and briefs are here referred to and made part of this petition; That the appeal is a meritorious action and cannot be dismissed without causing irreparable injury to appellant; That the Case was tried and appeal prepared by William S. Boyle.

II.

That the records in the Supreme Court will show that the Case was set down for argument some time ago, and William S. Boyle was ill in St. Mary's Hospital and his condition was diagnosed as grave.

Respondent's Exhibit No. 2—(Continued)

III.

That William S. Boyle requested Mr. Baldy to appear before the Court, and to assist him William S. Boyle gave Mr. Baldy an outline of his argument; That Mr. Baldy went before the Court after saying—"That he did not know anything about the matter and had the oral argument continued until or about January 13th, 1948, in the Supreme Court".

IV.

That without notice to William S. Boyle, Mr. Baldy recently appeared in the Supreme Court and filed, or caused to be filed, a stipulation asking for an order for the dismissal of the appeal; That the stipulation, according to a letter received from the Honorable Ned Turner, Clerk of the Supreme Court, was signed: "The Union Lead Mining and Smelter Company, and W. E. Baldy, or Warren E. Baldy, Counsel for Appellant."

V.

That the stipulation for order for dismissal was not authorized by a resolution voted upon by a majority of the Board of Directors, or at all, by the Union Lead Mining and Smelter Company, appellant;

That Mr. Baldy had no right to dismiss the appeal until consented to by appellant and counsel.

VI.

That the dismissal of the appeal was obviously motivated by Don Blackwood, who at times during

Respondent's Exhibit No. 2—(Continued)

the trial worked and testified against his own company, the Union Lead Mining and Smelter Company, in favor of respondent. At the time, Blackwood was and is now a Director of the appellant corporation; That W. E. Baldy was and is Secretary of the appellant corporation; That his action toward William S. Boyle, whom he regarded as Chief Counsel in the Case, is inexplicable, and particularly after he, Baldy, had the matter continued until January 13th, 1948, or thereabout.

VII.

That the appellant paid all costs in advance; That the appellant was very optimistic of success before the Supreme Court, but nevertheless Mr. Baldy requested the matter to be dismissed with no costs to appellant.

VIII.

Mr. Baldy knew of the desire of William S. Boyle to argue the appeal, or to submit the matter, without argument if deemed necessary.

IX.

That trust funds had been created to pay the full amount of the judgment rendered in the District Court, with interest to protect the interests of respondent; That a like trust fund was created to pay other claimants if necessary, and the said funds were created without the demand of respondent.

X.

That a suit was commenced by one H. Cowden

Respondent's Exhibit No. 2—(Continued)

representing himself, wife, and daughter, and one F. Haskell against the Imperial Lead Mines, Inc., successor to appellant, and appellant knew that Haskell was entitled to part of the sum of money held in trust to redeem Haskell's claim, and was prepared to pay a certain sum of money; That the respondents knew that William S. Boyle would not settle any claim with respondents until the Supreme Court of Nevada affirmed any judgment rendered in the District Court arising in Department No. 2, in Washoe County, Nevada.

The respondent in Case No. 3499 with Blackwood, who testified against appellant all through the District Court action, demanded of W. E. Baldy, Secretary for appellant corporation, that he dismiss the appeal and the same was done without notice to William S. Boyle, whom Baldy and Blackwood knew would not permit such action until the dismissal was authorized by a majority vote of the Board of Directors of the Union Lead Mining and Smelter Company, a corporation; The President of the corporation is hostile to the dismissal.

XI.

That Mr. Baldy was not joined by Mr. Robert Emmet Berry, associate counsel of William S. Boyle, in asking dismissal of appeal or any stipulation thereto.

XII.

That appellant will suffer irreparable injury and damage if the order dismissing the appeal is not

Respondent's Exhibit No. 2—(Continued)

set aside and the appeal reinstated; That the law points to be decided by the Supreme Court are of infinite value to Nevada.

Wherefore, the Union Lead Mining and Smelter Company prays that the order dismissing the appeal in Case No. 3499 be reconsidered and the same set aside for the reasons above set forth, and the order dismissing the appeal be set aside and the appeal be reinstated the reasons hereinbefore set forth.

/s/ WILLIAM S. BOYLE,
Petitioner

Subscribed and sworn to before me this 6th day of December, A. D. 1947.

[Seal] /s/ RALPH MORGALI,
Notary Public, Washoe County, Nevada. My commission expires Feb. 4, 1948.

[Endorsed]: Filed Dec. 8, 1947.

[Title of Supreme Court and Cause No. 3499.]

January 27, 1948

ORDER GRANTING MOTION TO VACATE ORDER DISMISSING APPEAL, AND REINSTATING APPEAL

On December 15, 1947, pursuant to notice to respondent, the appellant moved this court to vacate an order made and filed November 26, 1947, dis-

Respondent's Exhibit No. 2—(Continued)

missing said appeal. Said order of dismissal of November 26, 1947, was made pursuant to a written stipulation for dismissal. This stipulation comprised one instrument signed "Union Lead Mining & Smelter Co., Appellant. W. E. Baldy, of counsel for Appellant," and a second instrument comprising a consent to such dismissal signed by Brown & Wells, attorneys for plaintiff and respondent.

The notice of such motion to restore the appeal was signed by William S. Boyle and Robert Emmet Berry, as counsel for appellant. Such latter motion was partly heard and argued on December 15, 1947, and thereafter on January 27, 1948, further presented, argued and submitted.

The original dismissal of the appeal apparently was made pursuant to informal action of three of the five directors, B. Donald Blackwood, W. E. Baldy and O. M. Floe, and without the knowledge or consent of William S. Boyle, chief counsel for appellant, or his associate, Mr. Berry.

The motion to reinstate the appeal was made pursuant to informal action of four of the five directors, namely, John H. Somers, W. E. Baldy, W. K. McMullen and O. M. Floe.

Such later action, it will be observed, repudiated the former action authorizing the dismissal, and in such repudiation, Directors Somers and Baldy joined, although they had participated in the original authorization of the dismissal.

Although counsel for respondent, in opposing the

Respondent's Exhibit No. 2—(Continued)

motion to restore the appeal, insisted upon the right of W. E. Baldy, as one of the attorneys for appellant, to bind his clients in the dismissal of the appeal, he submitted his view that the matter lay entirely within the discretion of the court.

The appeal was perfected July 23, 1947, and the record on appeal, comprising two large volumes (the transcript of the testimony comprising almost 600 pages in itself), was filed in this court July 25, 1947. The opening brief on appeal was filed July 25, 1947, the answering brief August 14, 1947, and the reply brief on August 20, 1947. Argument on the appeal was postponed by reason of Mr. Boyle's illness to January 13, 1948. In the meantime, the matter was further complicated by a transfer of the appellant's property by discovery by the purchaser that there were outstanding numerous "production certificates" issued by the respondent and in turn secured by a deed of trust upon the property, and that suits were threatened or pending on the part of sundry stockholders of the appellant corporation. It further appeared that the purchaser of appellant's property had deposited in trust a part of the purchase price to protect itself against a possible judgment lien against the property in the event of an affirmance of the judgment.

No transcript was made of the proceedings before this court on the motion to reinstate the appeal, and the situation above outlined is taken from notes made by the Justices and may not be accurate in

Respondent's Exhibit No. 2—(Continued)

all details. It is clear, however, that there has been some dissension among the directors of the appellant corporation and that neither the original action of what was then a majority of the directors authorizing the dismissal nor the later order made by what was then a majority of the board of directors repudiating the dismissal was formal, corporate action of the corporation. In neither case was the purported resolution of the directors had at a regular meeting of such directors, or at a special meeting of such directors held pursuant to notice, or at a meeting held by the consent of all of the directors, or whose action was approved by all of the directors. The bylaws were not submitted to the court.

It has been made clear to the court that the consummation of the purchase of appellant's mining property, the payment of the purchase price, the release of funds impounded pending the present appeal and the continued operation of the mining property by appellant's successor will be contingent upon the conclusion, dismissal or settlement of other actions in addition to the present appeal. The affidavit of Mr. Boyle, supported by appellant's voluminous brief, signed by Mr. Boyle, Mr. Baldy and Mr. Berry, and its reply brief signed by the same counsel, as well as the lengthy record on appeal, indicate that the appeal was taken in good faith and in reliance upon the opinion of counsel for appellant that the points raised were well taken.

Without passing upon the general proposition of

Respondent's Exhibit No. 2—(Continued)

law as to the authority of junior counsel to dismiss an appeal contrary to the wishes of senior counsel and the latter's associate as applied to the particular facts of this case (in support of the original dismissal by Mr. Baldy there was introduced Mr. Boyle's written resignation as secretary and his "withdrawal from all law suits and litigation wherein the Union Lead Mining & Smelter Co. is a party, dated November 18, 1947," and it was further made to appear that Mr. Boyle's fees had not been paid), we are of the opinion that the reinstatement of the appeal will result in less danger of injustice to the parties.

By reason of the matters above set forth and good cause appearing therefor

It Is Hereby Ordered that the motion to reinstate said appeal be, and the same hereby is, granted; that the order of November 26, 1947, dismissing said appeal, be, and the same hereby is, vacated; and that said appeal be, and the same hereby is, restored and reinstated; and that time for oral argument of said appeal be hereafter set by the court on the calling of its next calendar or otherwise or upon stipulation of counsel for the respective parties.

Done in Chambers this 27th day of January, 1948.

/s/ HORSEY,
Justice
/s/ BADT,
Justice

Respondent's Exhibit No. 2—(Continued)

Eather, C. J., being absent on account of illness, it was stipulated by counsel for the respective parties to the motion that the same might be presented and submitted to Horsey and Badt, JJ.

cc—William S. Boyle, Robert Emmet Berry, W. E. Baldy, Brown & Wells, Ralph Morgali.

[Endorsed]: Filed Jan. 28, 1948.

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe

No. 107,708

R. H. DACHNER, doing business under the firm name and style of "Pacific Machinery & Engineering Company," Plaintiff,

vs.

UNION LEAD MINING AND SMELTER COMPANY, a Nevada Corporation, Defendant.

JUDGMENT

Whereas, the Honorable A. J. Maestretti made and ordered to be served the following decision in the above entitled matter:

Decision of the Court

The Court: In this case the remittitur of the Supreme Court stated:

"It is evident from what we have said that the judgment must be reversed and the case remanded

Respondent's Exhibit No. 2—(Continued)

for a new trial, as the pleadings and findings cannot be modified in this Court to meet the situation. It is accordingly ordered that the judgment and the order denying appellant's motion for new trial be, and the same hereby is, reversed and the case remanded to the District Court for a new trial in accordance with the views herein expressed, and pursuant to such amendments in the pleadings as may be allowed in the discretion of the Court and in accordance with any terms and conditions it may reasonably impose and whether made before such new trial or before submission of the cause in order to conform with the proofs. The appellant will recover its costs on this appeal."

When the remittitur was received in this court and counsel appeared in court, the Court asked of counsel what if any amendments they wished to make to any of the pleadings; and none of counsel suggested any amendments, the plaintiff specifically standing upon his pleadings as they were in court.

Consequently, the remittitur requirements for the allowance of amendments was voided by the action of counsel for the respective parties, who refused and still refuse to offer or make any amendments. This motion for dismissal of the action, therefore, was made by the party who prevailed at the initial trial; and inasmuch as neither of the litigants has suggested any amendments to their pleadings, it is not probable that a different result would be had in a new trial upon the same pleadings.

Respondent's Exhibit No. 2—(Continued)

The Court finds that it has jurisdiction to hear and determine the motion to dismiss.

The Court further finds that the settlement was made between the parties as alleged in the motion and the affidavit in support thereof.

The Court finds that the settlement was made without the presence of fraud or undue influence.

The Court finds that the settlement was made between competent parties.

The Court finds that the plaintiff herein and the Cowden-Haskell people did have legal reason to believe that Blackwood and Morgali and Baldy had the authority to enter into the agreement.

It is therefore ordered that the motion to dismiss is granted with prejudice.

/s/ A. J. MAESTRETTI,
District Judge

Therefore in pursuance thereof,

It is the judgment of the Court that the motion to dismiss the above-entitled action is granted with prejudice.

Done in Open Court this the 8th day of March, 1949.

/s/ A. J. MAESTRETTI,
District Judge

[Endorsed]: Filed March 8, 1949.

Respondent's Exhibit No. 2—(Continued)

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe

No. 107,708

[Title of Cause.]

JUDGMENT

The above entitled action coming on regularly for trial, before the above entitled court sitting without a jury, a trial by jury having been waived by the parties hereto.

The plaintiff, appeared personally and by his Attorneys Brown and Wells, and the defendant filed a verified answer and cross complaint in said action and appeared by its attorney, William S. Boyle, and said cause coming on for trial and all the pleadings herein; thereupon evidence was introduced in said cause by plaintiff and defendant and the matter was submitted to the court for its decision, and the court having heretofore filed its decision, and the court having heretofore filed herein its opinion, and Findings of Fact and Conclusions of Law, wherein it finds for the plaintiff and against the defendant and awarded judgment to plaintiff in the sum of Twenty-Five Thousand and Four Hundred Sixty-Seven One Hundredths Dollars ($25,467.07) and plaintiff's costs of suit.

Now Therefore, by reason of the law and said Findings it is Ordered and Adjudged that plaintiff, R. H. Dachner, do have and recover of defendant,

Respondent's Exhibit No. 2—(Continued)

Union Lead Mining and Smelter Company, the sum of Twenty-Five Thousand Four Hundred Sixty-seven and Seven One Hundredths Dollars ($25,-467.07), lawful money of the United States, with interest thereon at the rate of seven percent (7%) per annum from the 22nd day of May, 1947, until paid; together with costs and disbursements in the sum of Thirty Seven Dollars and Fifteen Cents ($37.15).

Done in Open Court this 16th day of June, 1947.

A. J. MAESTRETTI,
District Judge

[Endorsed]: Filed June 16, 1947.

In the Supreme Court of the State of Nevada

No. 3578

UNION LEAD MINING AND SMELTER COMPANY, a Nevada Corporation, Appellant, vs. R. H. DACHNER, Doing Business Under the Firm Name and Style of "Pacific Machinery & Engineering Company," Respondent.

Appeal from Second Judicial District Court, Washoe County; A. J. Maestretti, Judge, Department No. 2.

Affirmed.

John R. Ross, of Carson City, Nevada, and Leslie Riggins, of Reno, Nevada, for Appellant.

Ernest S. Brown, of Reno, Nevada, for Respondent.

OPINION

By the Court, Merrill, J.:

This is an appeal from an order of the trial court dismissing the action below. To state the matter conservatively, the case involves many confusing and unusual aspects. The parties will here be designated by name: appellant as "Union"; respondent as "Dachner." Dachner was the plaintiff below in an action for contract damages. Union was the defendant.

The first unusual aspect of the case is that the action of the trial court with which we are here concerned was taken pursuant to motion of the plaintiff Dachner to dismiss his own action. This

appeal from that order is taken by the defendant Union.

These unusual circumstances are explained by circumstances still more unusual. The appeal before us is the second appeal taken by Union in the course of this litigation. Earlier, Dachner secured judgment below and Union thereupon appealed from that judgment to this court. Pending that appeal Dachner executed upon property of Union and thereby, pending final determination of the matter, secured full satisfaction of his judgment. On appeal from the judgment, this court reversed the trial court and remanded the matter for a new trial; (Dachner vs. Union Lead Mining and Smelter Co., 65 Nev. 313, 195 P.2d 208.) The dismissal of the action below followed, Dachner thereby, and the opinion of this court to the contrary notwithstanding, retaining the benefits of his execution upon the reversed judgment.

These unusual circumstances, in turn, are explained and justified by Dachner's contention that, pending the first appeal (that from the judgment), the action was settled by accord and satisfaction, under the terms of which Dachner retained the fruits of his execution. The motion to dismiss was presented below and was granted by the trial court upon the ground that such settlement rendered the action moot.

Union contends that if any settlement agreement ever was reached, it was without authority on the part of anyone to bind Union. Here we have reached the heart of the present controversy. Union

does not question the procedure followed in the trial court and no questions involving such procedure are before us. Union's position is simply that dismissal was not warranted under the facts. For proper consideration of that position, the outline of perplexities heretofore set forth must be somewhat elaborated.

Dachner secured judgment in the sum of $25,467.07 on June 16, 1947. The month following, Union took its first appeal to this court. The succeeding events may be more easily assimiliated if stated under separate headings.

The "Imperial" contract. On August 27, 1947, Union entered into a contract with Imperial Lead Mines, Inc. for sale to Imperial of all Union's mining properties and assets. Union was to receive 40 percent of the capital stock of Imperial and a note for $200,000. The agreement recognized that Union had certain obligations which constituted liens against its properties and which were to be discharged by Union. If not so discharged, then they might be paid by Imperial and such payments credited against sums due to Union. Specified as one of these obligations was the Dachner judgment then pending on appeal. Also specified were certain "production certificates" then outstanding, being monetary obligations secured by trust deed and also constituting charges against future production of the mine.

The Dachner levy of execution. On November 20, 1947, Dachner successfully levied execution on

Union's bank account in satisfaction of his judgment then pending on appeal to this court.

The Cowden-Haskell action. Certain of Union's production certificates were held by one Cowden and one Haskell, both being Union stockholders. Imperial entered into a contract relative to acquisition of these certificates and stock holdings. On November 21, 1947, Cowden and Haskell brought action against Imperial based on this agreement and asking judgment in the sum of $24,600. An attachment was levied against Imperial's bank account. While the action was brought against Imperial and was based on its contract, still under the terms of Union's contract with Imperial, the retiring of the production certificates remained primarily Union's obligation.

Preliminary settlement discussions. After commencement of this action, conferences were held between representatives of Union and Imperial. It was decided that rather than oppose the action, the certificates of Cowden and Haskell would be bought up by Union on the most favorable terms that could be secured by negotiation. A cashier's check for $16,000 was secured by Union made payable to its president, Somers. It was then decided that in negotiations with Cowden and Haskell, Union would be represented by its vice-president, Blackwood. At the insistence of Ralph Morgali, Imperial's attorney, the cashier's check was then exchanged for one payable to Blackwood in order to assure and demonstrate Blackwood's authority to act for and bind Union in the negotiations and settlement.

The settlement agreement. The settlement negotiations were held November 25, 1947, in the office of Brown & Wells, Reno attorneys for Cowden and Haskell and also attorneys for Dachner. Present were both Brown and Wells, Blackwood and Morgali. An agreement was reached for settlement in the sum of $20,235, being more than $4,000 less than the amount sought by the action. According to the affidavits and testimony of Brown and Wells as given before the trial court on motion to dismiss, in consideration of the settlement at that figure it was agreed by Blackwood that the Dachner action likewise be deemed settled for the sums secured on execution.

The settlement carried through. The following day Morgali returned to the office of Brown & Wells to carry out the terms of the settlement. He presented the Blackwood check and a second check for the balance, $4,235. He received the production certificates and stock certificates of Cowden and Haskell. A telephone call was then placed by Brown to W. E. Baldy, Union's secretary, member of its board of directors and attorney, in Carson City, Nevada, advising Baldy that the pending appeal from the Dachner judgment was to be dismissed. Baldy confirmed the fact that the settlement agreement included settlement of the Dachner action by checking with Blackwood. O. M. Floe, a third member of Union's board of directors, was also consulted and aproved the settlement and dismissal. Baldy then dismissed the appeal. Cowden and

Haskell then dismissed their action with prejudice and their attachment was released.

Reinstatement of the appeal. In the Dachner action, Union had been represented by three attorneys: Baldy, Wm. S. Boyle of Reno, and Robert E. Berry of Virginia City, with Boyle acting as senior counsel. During the events so far related, Boyle had been seriously ill, had been hospitalized and was then convalescing at his home. He had written Union asking to be relieved of his duties as counsel. A copy of this letter had been received by Baldy at the time he was instructed to dismiss the appeal. Dismissal of the appeal, however, was directly contrary to Boyle's previous advice to Union. On hearing of the action taken, Boyle summoned a majority of Union's officers and board members who thereupon, amongst themselves, repudiated the dismissal (Baldy and Floe reversing themselves in this regard), repudiated Blackwood's action in including settlement of the Dachner action as consideration for settlement of the Cowden-Haskell action against Imperial, and instructed Boyle to move this court for reinstatement of the appeal. No demand ever was made of Cowden or Haskell for return of the money paid. No tender back of the production certificates or stock certificates ever was made. Boyle again became active as senior counsel for Union and the motion for reinstatement was filed and duly made to this court. In affidavits filed in opposition to the motion, the contended settlement of the action was disclosed. It was not, however, argued to this court. The question

presented by the motion was not whether grounds for dismissal existed. The sole question was whether an authorized dismissal had in fact been accomplished. This court ordered reinstatement of the appeal. In doing so, however, it clearly did not decide that grounds for dismissal did not exist. The order for reinstatement stated: "Without passing upon the general proposition of law as to the authority of junior counsel to dismiss an appeal contrary to the wishes of senior counsel [which this court recognized to be the issue confronting it] * * * we are of the opinion that the reinstatement of the appeal will result in less danger of injustice to the parties." No reference whatsoever was made to the contended settlement.

So much for the factual background.

Union's first contention is that the record demonstrates lack of authority in Blackwood to bind Union by his settlement of the Dachner action. Union emphasizes in this regard that his acts were taken without the formal sanction of Union's board of directors. It does not appear, however, that any formal board action whatsoever was taken prior to the settlement conference. If Blackwood was without actual formal authority to settle as he did, he was likewise without actual formal authority to settle in any manner whatsoever. The fixing of any limits upon his authority by formal board action was done, if at all, by way of partial ratification and wholly after the fact.

With reference to his authority, the trial court in dismissing the action below apparently proceeded

upon the theory of ostensible authority and specifically found as follows: "The Court finds that the plaintiff herein and the Cowden-Haskell people did have legal reason to believe that Blackwood and Morgali and Baldy had the authority to enter into the agreement."

It cannot be denied that there is substantial evidence in the record to support this finding. Blackwood was armed with a cashier's check to his own order supplied by Union for the purposes of settlement. Morgali, Imperial's attorney, did not question Blackwood's authority to proceed as he did and thus gave indication (at least so far as Imperial was concerned) that he concurred in Blackwood's actions and that Blackwood was proceeding within the scope of his authority. Morgali testified before the trial court that he had conveyed to Brown and Wells the fact that Imperial desired to have all litigation cleared up so that they could get to mining; that he "was interested from Imperial's point of view in making a settlement so there would be no further litigation." Brown and Wells had every right to assume that both Imperial and Union were interested in disposing of the Dachner litigation. Certainly they could hardly be expected to possess greater knowledge than Morgali's as to Blackwood's actual authority, nor possess greater insight than his into the intentions of Union's officials. Their right to rely upon Blackwood's apparent authority is further strengthened by the fact that neither Baldy nor Floe questioned it until their conference with Boyle.

Even should there be question as to factual support for such a finding, however, it should be clear that Blackwood's conduct had not been properly repudiated and had, therefore, in effect been ratified by Union's failure to demand rescission of the entire agreement as unauthorized. To permit Union to ratify Blackwood's action in part only and to retain in whole the benefits thereof would be to permit it to rewrite the settlement agreement to suit itself.

That the contract, while in settlement of an action against Imperial, was for the benefit of Union cannot be denied. The trial court had before it the statement of Union's president, Somers, to such effect. The production certificates secured thereby were Union's obligations which Union was required to retire and upon consummation of the settlement, Union treated those obligations as no longer valid or outstanding. Union's stock interest in Imperial and its $200,000 note both became enhanced in value by removal of the liens securing the obligations. It is clear that Union benefited from the settlement and retained the benefits thereof while purporting to repudiate the agreement in part. The settlement must then, be taken to have been ratified in whole. Alexander vs. Winters, 24 Nev. 143, 50 P. 798; Federal Mining & Engineering Co. vs. Pollak, 59 Nev. 145, 82 P.2d 1008; See: concurring opinion Defanti vs. Allen Clark Co., 45 Nev. 120, 128, 198 P. 549, 552; Restatement of the Law, Agency, sec. 99.

In Federal Mining & Engineering Co. vs. Pollak, supra, this court quoted with approval from 2 Fletcher Cyclopedia Corporations as follows: "This

rule is based upon the doctrine of ratification in toto, under which a principal must either ratify the whole transaction or repudiate the whole. He cannot separate the transaction and ratify the part that is beneficial to him, repudiating the remainder; but if he, of his own election and with full knowledge, accepts and retains the benefits of an unauthorized transaction, he must also accept the part that is not beneficial, and will be held to have ratified the whole. In some states this rule is adopted by statute."

As the court there stated: "We have no such statute in this state, but in view of the decisions heretofore rendered by this court, the question as to the applicability of the rule to the facts of this case is not an open one in our jurisdiction."

Union next presses upon us the action of this court in reinstating the appeal as res judicata upon the question of settlement. As we have already pointed out, however, the order reinstating the appeal was not based upon lack of grounds for dismissal. This court was there concerned only with the question whether the appeal had properly been dismissed by one in authority.

True, if the action had become moot by virtue of the settlement, it was moot when this court handed down its opinion upon the judgment. Thus this court undoubtedly has been placed in the somewhat quixotic position of striving mightily to produce a futility. True, Dachner might have moved this court for dismissal of the appeal upon the ground of settlement and thus specifically directed the attention of the court to the moot status of the

matter. However, if the fact of settlement was not presented to the court as a basis for action, neither was it concealed from the court. Thus it can hardly be said that Dachner had abandoned or waived his contentions in relation thereto and his continuing with the appeal upon the merits cannot be said to have operated to nullify the settlement. Mills County vs. Burlington & Missouri River Railroad Co., 107 U.S. 557, 27 L.Ed. 578, 2 S.Ct. 654 (in which case the Supreme Court of the United States found itself in a situation substantially identical to that confronting us). Under the circumstances it would ill benefit us to read into the order of reinstatement an effectiveness never intended and contrary to its express language for the sole purpose of breathing life into the controversy over which this court was then laboring.

The order of the trial court is affirmed with costs.

Badt, C. J., and Eather, J. concur.

Attest: This is a full, true and correct copy Anna Legarza, Official Reporter.

Filed December 18, 1951. Ned A. Turner, Clerk of Supreme Court.

Clerk's Certificate

State of Nevada—ss.

I, Ned A. Turner, the duly elected and qualified Clerk of Supreme Court of said State of Nevada, do hereby certify that the attached is a true and

correct copy of the original opinion Case No. 3578, filed December 18, 1951. Union Lead Mining and Smelter Company, a Nevada Corporation, Appellant, vs. R. H. Dachner, Doing Business Under the Firm Name and Style of "Pacific Machinery & Engineering Company," Respondent.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in Carson City, Nevada, this 26th day of December, A. D. 1951.

[Seal] /s/ NED A. TURNER,
Clerk of Supreme Court of the
State of Nevada.

[Endorsed]: No. 13,765. United States Court of Appeals for the Ninth Circuit. G. L. Thompson, as Trustee in Bankruptcy of the Union Lead Mining and Smelter Company, bankrupt, Appellant, vs. R. H. Dachner, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 17, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,765

In the Matter of UNION LEAD MINING AND SMELTER COMPANY, Bankrupt

G. L. THOMPSON, as Trustee in Bankruptcy of Union Lead Mining and Smelter Company, Bankrupt, Appellant,

vs.

R. H. DACHNER, Appellee.

APPELLANT'S DESIGNATION OF RECORD FOR APPEAL

Appellant designates as material to his Appeal those portions of the record heretofore designated by him in Appellant's designation of record for Appeal filed in the United States District Court for the Northern District of California, Southern Division, on the 1st day of May, 1953.

Dated: July 21, 1953.

/s/ ALEX L. ARGUELLO,
Special Counsel for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 23, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD FOR APPEAL

Appellee designates the following portions of the record as material to his appeal:

1. Appellee's exhibits.

2. Reporter's transcript of proceeding of July 26, 1951.

3. Certificate and Report of Referee dated March 12, 1952, specifically including "Referee's Notes", all of which were filed on September 24, 1952.

/s/ JASPER W. WEINBERGER,
/s/ HELLER, EHRMAN, WHITE & McAULIFFE,
Attorneys for Appellee.

[Endorsed]: Filed Aug. 3, 1953. Paul P. O'Brien, Clerk.